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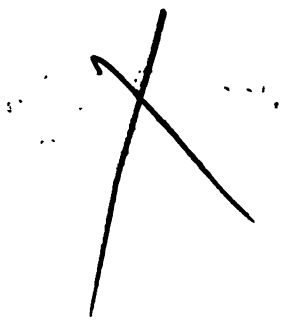

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

By OCTAVIUS PICKERING,

COUNSELLOR AT LAW.

VOLUME III.

THIRD EDITION.

WITH NOTES AND REFERENCES,

BY J. C. PERKINS.

BOSTON:
LITTLE, BROWN AND COMPANY.
1866.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF SUFFOLK AND NANTUCKET, MARCH TERM 1825, AT BOSTON.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE,
HON. LEVI LINCOLN,
HON. MARCUS MORTON,
} JUSTICES.

MEMORANDUM. —Mr. Justice LINCOLN, having been elected, in April, 1825, governor of the commonwealth, resigned his seat on the bench; and his Honor. MARCUS MORTON, of Taunton, in the county of Bristol, lieutenant governor, having been appointed to fill the vacancy, resigned the office of lieutenant governor, and on the 5th of July, at a session held by adjournment, took his seat as a justice of this Court.

JOSEPH HARRIS Junior *versus* JOHN AIKEN *et al.*, Principals, and WARD JACKSON *et al.*, Trustees.

One summoned as trustee in a process of foreign attachment, disclosed that the principal defendant had covenanted to build a house for him, and that he had covenanted to pay such defendant certain sums at certain stages of the work; that he had generally paid before the instalments became due, but that he had no means of ascertaining whether at the time of the service of the writ the payments were in advance of the work or not. *Held*, that he should not be charged as trustee.

JACKSON and LINCOLN, the supposed trustees, in their answers, disclosed an agreement made on the 21st of Decem-

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Harris v. Aiken.

ber, 1822, between themselves and Aiken & Cushing, the principal defendants, wherein it was stipulated that Aiken & Cushing, who were housewrights, should finish by the 1st of August a dwellinghouse which they had begun to erect on and of one Rice, but which at the time of the agreement had been purchased by Jackson & Lincoln, and that they should find all the materials, except lumber, and that Jackson & Lincoln should pay them certain sums of money at different stages of the work, and furnish the lumber which should be necessary; that if the house should be completed according to the agreement, Jackson & Lincoln should sell the house and land, provided such a price could be obtained as would indemnify them for the purchase money paid to Rice, the expenses incurred by them in pursuance of the agreement, and all sums which should be due to them from Aiken & Cushing, and after indemnifying themselves out of the proceeds of the sale, should pay over the surplus, if any, to Aiken & Cushing; and that if Aiken & Cushing should refuse or unreasonably neglect to proceed in completing the house, Jackson & Lincoln might take upon themselves the completion of it, and in such case, all the covenants on their part not performed should be void. They further answered, that the house was completed in June, 1823, and that the house and land were sold in October following, for a sum exceeding their demands against Aiken & Cushing; that the plaintiff's writ was served on them on the 17th of January, 1822, and that ten months afterwards, when the interrogatories were put to them, they had no means of ascertaining what was the quantity of materials furnished or what was the state of the work at that time; that their accounts, which they offered for inspection, would show the times when advances were made by them to Aiken & Cushing, but that they had no means of ascertaining whether instalments were due at those several periods; that in their opinion the several instalments were paid as soon as they were due, and sometimes sooner; that payments were sometimes made without ascertaining whether the work was in such a state of forwardness as to entitle Aiken & Cushing to demand them; and that it was the intention of the respondents, that the work should always be of more value than their advances

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and that generally it was so, but that there were periods when they felt anxiety lest they had advanced too much.

Harris v. Aiken.

July 12th. 1824

W. J. Spooner, for the supposed trustees, argued, that before the completion of the house the interest of Aiken & Cushing was contingent, and so not liable to the trustee process. *Davis* v. *Ham & Trs.*, 3 Mass. R. 33; *Wentworth* v. *Whittemore & Tr.*, 1 Mass. R. 471. Supposing that the inability of Jackson & Lincoln to deny positively that the value of the work was at any time greater than the advances made by them, must be taken as an admission that it was greater at the time when they were summoned, it does not affect the contingency upon which Aiken & Cushing's claim to an eventual balance rested, namely, their completing the whole contract by a given time. So if it must be considered that an instalment was due, it does not follow that Jackson & Lincoln must be charged as trustees. On a mere covenant like this to pay money, there is not that indebtment which the trustee law contemplates. There is a promise to pay, and an action may be sustained to recover *damages* for the breach of it, but there is no debt independent of the covenant. The right of Aiken & Cushing was to receive the money for the purpose of building therewith a house for Jackson & Lincoln, and the plaintiff cannot attach that right without subjecting himself to the corresponding obligation. *Owen* v. *Estes & Trs.*, 5 Mass. R. 330; *Brigden* v. *Gill & Tr.*, 16 Mass. R. 522.

S. D. Parker, for the plaintiff, contended that it was manifest by the answers of the respondents, that at the time of the service of the writ they had in their hands money or specific articles of lumber and materials, or both money and materials, of the principal defendants; and that, at all events, they had not discharged themselves on their answers, and therefore they must be held trustees, according to the case of *Sebor* v. *Armstrong & Tr.*, 4 Mass. R. 206.

PARKER C. J., in giving the opinion of the Court, said in substance, that there was nothing in the answers to charge the respondents as trustees. The question raised was, whether the work was in advance of the payments, so as to make them chargeable It does not appear that it was. They an-

March 2a

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Harris v. Aiken.

swer that in general they had paid in advance, but they cannot say that at no time was the balance against them. It was contended that they must discharge themselves, and the case of *Sebor* v. *Armstrong & Tr.* was referred to, where the trustee answered that he had accepted a draft in favor of the principal defendant which he thought was payable to order The Court said that as he did not state the fact positively, and did not ask for time to make inquiry whether the draft was or was not payable to order, he should be charged. But this case is totally different; and though we wished for a more definite answer, there is good reason to believe a more definite one could not be given. For any sum which might be due from Jackson & Lincoln at their final settlement with Aiken & Cushing, they would be trustees, if summoned at that time.[1]

Trustees discharged.

EDWARD J. ROBBINS *versus* JAMES OTIS.*

In *assumpsit* for goods sold, the plaintiff, to take the case out of the statute of limitations, proved that the defendant said he would pay for the goods, if *A. B. would say that he had had them*, or, *if the plaintiff would prove it by A. B.* — leaving it uncertain which expression was used. *Held*, that the plaintiff had not laid a foundation for the admission of proof of A. B.'s declarations.

THIS was an action of *assumpsit* to recover the price of a quantity of timber sold to the defendant in 1808. The statute of limitations was pleaded, and the plaintiff, in order to take the case out of the statute, produced a witness who tes-

[1] See *Cleveland* v. *Clap*, 5 Mass. R. 204, 205. Though the answer of a trustee, where the language is doubtful, is to be construed most strongly against himself, yet it is not to receive a construction against the fair and natural import of the language taken all together. *Kelly* v. *Bowman*, 12 Pick. 383. In *Gordon* v. *Coolidge*, 1 Sumner, 537, it is held not to be generally true, that persons sued as trustees under the foreign attachment laws in Maine, are to be charged as such, unless they clearly discharge themselves upon their examination. On the contrary, the court can adjudge them trustees, only when upon the examination there is clear and determinate evidence, free from reasonable doubt, that they have property in their hands, of which they ought to be adjudged the trustees of the debtor

See 1 Pick. 368, *S C*

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ified that the defendant said either, "*if Ellison will say* that I have had the timber," or 'if the plaintiff *will prove by Ellison* that I have had it, I will pay for it," but which of these two expressions was used, the witness could not remember. The plaintiff then offered to prove that Ellison did say the defendant had had the timber, but this evidence was objected to, on the ground that the above expressions meant two different things and it was not clearly proved that the defendant said he would pay if Ellison would say he had had the timber, and so no foundation was laid for the admission of the evidence offered; and the judge who tried the cause, being of this opinion, rejected the evidence.

Thacher and *Warner* now contended, that it was a question for the jury, whether either, and which of the expressions, had been used by the defendant, and that the evidence rejected should have been received, to be considered by the jury or not, according as they should determine the first question. *Aylwin* v. *Ulmer*, 12 Mass R. 22; *Tyler* v. *Ulmer*, ibid. 169. *March 3d.*

But the whole *Court*, for the reason before given, were of opinion that the evidence in question was rightly rejected. *March 4th*

Fletcher and *Bliss* for the defendant.[1]

[1] See *Bangs* v. *Hall*, 2 Pick. (2d edit.) 368, and notes. A promise, to take a case out of the statute of limitations, must now be in writing and signed by the party chargeable thereby. Revised Statutes, 700, *c.* 120, § 13. But the same language which before would take a case out of the statute of limitations, will now remove it from its operation if reduced to writing. *Bangs* v. *Hall*, 2 Pick. (2d ed.) 380, note 1. See also *Dodson* v. *Mackay*, 4 Nev. & Man. 327.

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Felix Chazournes *versus* Thomas Edwards and William Frost.

Where a note is given in the name of a firm, by one of the partners, for the private debt of such partner, and known to be so by the person taking the note, the other partners are not bound, unless they have been consulted and have consented to the transaction.

The person taking such note cannot recover on it against one who indorses it without any consideration, thinking it to have been made by the firm; and the burden of proof is on the holder, to show that the indorser knew the circumstances under which it had been made.

Assumpsit against the defendants as indorsers of a promissory note, dated the 17th of May, 1823, purporting to be made by Edwards & Coffin, payable to the defendants in two months from date with grace, for the sum of 955 dollars, 23 cents.

The note was made by Albert Coffin, who at the time of making it was a partner in trade with Abraham Edwards, and was indorsed by Thomas Edwards on account of himself and partner, William Frost, in the name of their firm.

6 The defence was, that the note was made by Coffin without the knowledge or consent, and in fraud of his partner, Edwards, as payment or security for a debt due to the plaintiff from Coffin and one Bowes, his former partner, and for no other consideration.

William Whitney, the agent of the plaintiff who was a merchant in New York, testified that Bowes & Coffin purchased goods of the plaintiff in that city, for which they gave him their note payable in four months. The note was discounted for the plaintiff at the United States Branch bank, and was at the branch in Boston for collection. Before it became due, Bowes & Coffin, or one of them, applied to the plaintiff for further credit, stating that their partnership was dissolved, which rendered it inconvenient for them to pay it. The plaintiff wrote to the witness, stating his willingness to give them further credit if the witness thought they were safe persons to be credited. Afterwards, a short time before the note became due, Coffin applied to the witness, as agent of

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the plaintiff, for an extension of credit; which he agreed to give upon having a satisfactory note. Coffin proposed Edwards & Coffin's note at sixty days, indorsed by the defendants; with which the witness said he should be satisfied. Near the close of banking hours, on the day when the note became due, the witness found that Coffin did not come and he sent for him. Coffin accordingly came to his store and began to write a note, but soon stopped and observed that he might as well go to his own store and write it, as he should have to go up the street to get it indorsed by Edwards & Frost. He then went out and shortly returned with the note now in suit, with the names upon it which now appear. The witness then sent his clerk to the bank with a check to take up the old note of Bowes & Coffin, which being brought was given up to Coffin in exchange for the note now in suit. There was no other consideration for this note than what appears from the foregoing statement. The body of the note and the signature of the makers were in the hand-writing of Coffin.

Abraham Edwards, the partner of Coffin, being called as a witness by the defendants, was objected to by the plaintiff as interested, but being released he was admitted. He testified that on the 1st of May, 1823, after the dissolution of the copartnership between Bowes & Coffin, he formed a connexion with Coffin, which continued about three weeks. On the 24th of May the witness was surprised with information, that Coffin had absconded, having taken with him all the money which had been received in the course of their business, and having pledged the copartnership name for his private debts. The witness never consented that the name of Edwards & Coffin should be given for any debt of Bowes & Coffin or of Coffin, and never was asked by Coffin to give such consent, and had no suspicion that such a thing had been done, until Coffin had absconded. He denied any knowledge of the note now in suit, until several days after that event. He stated that no entry of it was ever made on the note book at the store, but that several days after Coffin had gone away a note book of Bowes & Coffin was shown to him by Coffin's brother, in which he saw an entry of the note, which book Coffin kept

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Chazournes v. Edwards.

under his own control, and which the witness never saw before. The witness was the brother of Thomas Edwards, and it was understood that the firms of Edwards & Coffin and of Edwards & Frost should indorse for each other. The witness had paid all the debts contracted in the course of the partnership business of Edwards & Coffin, but had refused to pay in all cases where Coffin had undertaken to pledge the copartnership name for his private debts.

There was no evidence given on either side (except what may result from the foregoing facts) in relation to the defendants' knowledge of the circumstances under which the note in suit was made.

A verdict was taken for the defendants by consent; and if the Court should be of opinion, that upon the above evidence the plaintiff was entitled to recover, the verdict was to be set aside and a verdict entered for the plaintiff; otherwise judgment was to be entered on the verdict.

8 March 4th.

Morey for the defendants. The plaintiffs not being innocent indorsees of this note, could not recover against Edwards & Coffin, the note having been given for a private antecedent debt of Coffin, as the plaintiff well knew, and without the assent or knowledge of Edwards. Bayley on Bills, (4th ed.) 47; *Shirreff* v. *Wilks*, 1 East, 49; *Arden* v. *Sharpe*, 2 Esp. R. 524; *Wells* v. *Masterman*, ibid. 731, *Ex parte Bonbonus*, 8 Ves. 540; *Green* v. *Deakin*, 2 Stark. R. 347; *Ridley* v. *Taylor*, 13 East, 175; *Livingston* v. *Hastie*, 2 Caines's R. 246; *Lansing* v. *Gaine*, 2 Johns. R 300; *Livingston* v. *Roosevelt*, 4 Johns. R. 251; *Dubois* v. *Roosevelt*, ibid. 262, note; *Dobb* v. *Halsey*, 16 Johns. R. 34, *Foote* v. *Sabin*, 19 Johns. R. 154; *Baird* v. *M'Donnell*, 4 Serg. & Rawle, 397; *Poindexter* v. *Waddy*, 6 Munf. 418. Neither can the plaintiff recover against the defendants. The note was not made and negotiated in the ordinary course of business, but was made for the occasion. The defendants were accommodation indorsers, they were mere sureties; and the Court will look at the circumstances of the case, without regarding the order in which the parties stand on the note. *Bickerdike* v. *Bollman*, 1 T. R. 405; *Corney* v. *Da Costa*, 1 Esp. R. 302; *Cory* v. *Scott*, 3 Barn. & Ald. 619; *Adams*

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v. *Gregg*, 2 Stark. R. 531. And the defendants are sureties, not for Coffin, but for Edwards & Coffin. The law presumes that they intended to indorse for Edwards & Coffin, and the case finds that there was a standing agreement between the firms of Edwards & Coffin and Edwards & Frost to indorse for each other. Fell on Guarr. 122 to 127; *Cremer* v. *Higginson*, 1 Mason, 323. The plaintiff has disabled himself from suing the principal debtors, by taking the note for an illegal purpose, and he cannot call upon the sureties, who supposed they were indorsing a note which was valid against the makers. *Tindal* v. *Brown*, 1 T. R. 169, *English* v *Darley*, 2 Bos. & Pul. 61; *Clark* v. *Devlin*, 3 Bos. & Pul. 365; *Gould* v. *Robson*, 8 East, 576; Fell on Guarr. 160 to 180; 13 East, 175; 2 Caines's R. 246.

S. D. Ward, for the plaintiff, admitted the general principle, that one of two partners cannot give a note in the name of the firm for his private debt, but he contended that if the other partner assents, or if the person taking the note has reason to think he assents, the partnership will be bound. This distinction is supported by the case cited from 13 East, 175, and it is applicable to the case before the Court. If the plaintiff was deceived by Coffin, Edwards must suffer, he having put it into the power of Coffin to deceive. But though the plaintiff may have no remedy against Edwards & Coffin, it does not follow that he cannot recover against the indorsers. If they knew the circumstances under which this note was made, at the time when they indorsed it, they are liable, and the burden of proof is on them to show that they were deceived. They were, as to the plaintiff, new makers of the note. There is no evidence that this was an accommodation indorsement. If it was, it is incumbent on the defendants to prove the fact. If it was not, they cannot be considered as sureties, and the plaintiff is entitled to recover.

W. Prescott replied.

PARKER C. J. delivered the opinion of the Court. The principle has been very distinctly settled in many cases in the English and New York reports, that a note or other security given in the name of a mercantile firm by one of the house, to pay or secure a private debt of his own, without the knowledge

March 7th

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or consent of his partners, cannot be recovered against the house.[1] It is so laid down in Bayley on Bills, (4th ed.) 47, and the cases cited in support of the position are numerous and decisive.

It is deemed fraudulent in the creditor of one of the partners to attempt to get security for his debt in a contract which the debtor undertakes to make for his partners, inducing him to avail himself of the power he has over the property of the house for his own private purposes.[2] And the knowledge o the creditor so conducting is shown by the very fact, that the debt he is attempting to secure is the debt of the individual and not of the company.

The only case which has a contrary tendency is that of *Ridley et al.* v. *Taylor*, 13 East, 175; in which case, however, the principle above stated is admitted, but it was thought that the facts did not show that knowledge on the part of the cred tor which would constitute the transaction fraudulent on his part. There were circumstances in the case from which it was thought the plaintiffs might reasonably infer, that the bill given to them by their debtor was one which he had a right within his general authority as a partner to transfer. Though the decision does not seem to be in exact conformity with the rule as before settled in several cases, yet the principle is clearly admitted. And certainly nothing is more just than the principle which restrains a partner, in the exercise of his power over the copartnership property or credit, to cases which relate to the copartnership concerns. It is sufficiently hard upon the partners, that they are to be bound in other cases

[1] *Munroe* v. *Cooper*, 5 Pick. 412; *Adams* v. *Paige*, 7 Pick. 542; *Flagg* v *Upham*, 10 Pick. 147; *Whitaker* v. *Brown*, 11 Wendell, 75; *Laverty* v. *Burr* 1 Wendell, 529.

So, if from the subject matter of the contract, or the course of dealing of the partnership, the creditor was chargeable with constructive knowledge of the fact, that the debt for which he takes the partnership security was a private debt of a particular partner, the partnership is not liable. *Green* v. *Deakin*, 2 Stark. R. 347; *New York Firemen Ins. Co.* v. *Bennett*, 5 Connect. R. 574. See also *Mercien* v. *Mack*, 10 Wendell, 461; *Everenghim* v. *Ensworth*, 7 Wendell, 326; *United States Bank* v. *Binney*, 5 Mason, 182.

[2] If a person colludes with one partner in a firm to in ure the other part ners, those others can maintain a joint action against the person so colluding *Longman* v. *Poole*, 1 Moody & Malk. 223.

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where an innocent indorsee is the holder of the securities improperly created, and nothing but the necessity of protecting innocent persons upon negotiable paper would justify this extension of their liability.

A series of cases decided in New York have established the rule in that state incontrovertibly. The case of *Livingston* v. *Hastie*, 2 Caines's R. 246, seems to have been well considered, and the decision has been recognised and enforced in the several cases of *Lansing* v. *Gaine and Ten Eyck*, 2 Johns. R. 300; *Livingston* v. *Roosevelt* and *Dubois* v. *Roosevelt et al.*, 4 Johns. R. 251; *Doe et al.* v. *Halsey*, 16 Johns. R. 34; and *Foot* v. *Sabin*, 19 Johns. R. 154.

The rule is summed up in these words and repeated in every case:—"Where a note is given in the name of a firm by one of the partners, for the private debt of such partner, and known to be so by the person taking the note, the other partners are not bound by such note, unless they have been previously consulted and consent to the transaction."

Now in the case before us the note in suit, which was made by Coffin in the name of Edwards & Coffin, who were partners, was given for the debt of a former house of Bowes & Coffin, with which Edwards had no connexion; and it is equally clear that the agent of the plaintiff knew this to be the case, for this note was given in lieu of a note by Bowes & Coffin, which lay over in the bank dishonored. There is not only no evidence that Edwards consented to the transaction, but there is positive testimony from Edwards that he never was consulted, never gave any consent, and was wholly ignorant on the subject until several days after the note was given, when Coffin had absconded. This makes the case much stronger than any of the New York cases, and differs it essentially from the case of *Ridley et al.* v. *Taylor* in 13 East.

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The counsel for the plaintiff, in his ingenious argument, admits the rule, but would qualify it by the introduction of an exception, to wit, that if the creditor had reason to believe or suppose that the person giving the note had authority from his partner, he should have a right to recover. No authority has been cited in support of this exception; and if there had been, we perceive no evidence in the report that would bring the

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case within the exception. If there had been good reason for the creditor to believe an authority in Coffin, from any conduct or declarations of Edwards, the other member of the house, the assent of Edwards might be implied.[1] It does not appear that Coffin was inquired of respecting his authority, or that he made any declaration on the subject.

We think it very clear that the plaintiff could not maintain an action upon the note against Edwards, one of the copartners.

Nor can we think the case is any stronger against the defendants as indorsers. The making and indorsing of the note were one transaction, and were in pursuance of a previous agreement to give such a note so indorsed. There is no room to suppose that the defendants had any consideration for indorsing or any indemnity therefor. Having been accustomed to indorse for Edwards & Coffin, they would naturally suppose that a note brought to them with their names as promisors was for the accommodation of that house. Certainly they would have no reason to imagine that the note was made by Coffin without the knowledge of Edwards, to secure the private debt of Coffin. They therefore, in the absence of all evidence, must be presumed to have thought it such a note as they were in the habit of indorsing. If then the note was inherently bad,
12 and made so by the act of the plaintiff, he taking it for the private debt of Coffin, to give him a right to recover of the defendants would insure to him the fruits of an unlawful act; and of consequence would take money from them without their having any chance of indemnifying themselves against the parties whose note they supposed they had indorsed, or else, by enabling them to recover against Edwards, would make him liable circuitously when he could not be liable directly. On this point also the case in 2 Caines's R. is very clear, and the other authorities cited are of the same tendency.

We cannot think with the counsel for the plaintiff, that the burden of proof is on the defendants, to show that they did not know the circumstances under which the note was made.

[1] See *Woodward* v. *Winship*, 12 Pick. 430; *Williams* v. *Walbridge*, 3 Wendell, 415; *Boardman* v. *Gore*, 15 Mass. R. 340; *Stone* v. *Marsh* 6 Barn. & Cress. 551; *S. C* Ryan & Moody, 364.

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They had a right to presume it a valid note against the firm, and were not bound to inquire whether Coffin had not abused the confidence of his partner. They are innocent persons; the plaintiff is not, for he knew the consideration of the note. We think the case is very clearly made out for the defendants in principle and by authority.[1]

Judgment according to the verdict.

Isaac Vancleef *versus* Lewis Therasson *et al.*

A merchant in New York sold goods there and received the purchaser's negotiable note in full for the goods, which note was afterwards lost. In *assumpsit* on an account annexed for goods sold and delivered, it was *held*, that the plaintiff could not amend his writ by inserting a count upon the note, the note and the account being different causes of action, but that he was entitled to recover on the original count, the giving of the note not being, by the law of New York, a payment.

Assumpsit on an account annexed to the writ, to recover the price of 40 firkins of lard sold and delivered by the plaintiff to the defendants, who at the time were partners in trade in the city of New York.

At the trial, before *Wilde* J., the plaintiff proved the sale and delivery, but it appeared that a negotiable note had been given by the defendants at the time, payable in four months, and that the plaintiff had given a receipt stating that the note 13
was received in full for the lard. Whereupon the plaintiff moved for liberty to amend his writ by inserting a count on the note, but this amendment was not allowed.

The plaintiff then offered evidence to prove that the note had never been paid, and that it was lost. The defendants'

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[1] See *Manufac and Mech. Bank* v. *Winship*, 5 Pick. 11; *Foster* v. *Andrews*, 2 Penrose & Watts, 160; *Vallett* v. *Parker*, 6 Wendell, 615; *U. S. Bank* v. *Binney*, 5 Mason, 183.

In an action against a firm upon a negotiable note made by one partner in the name of the firm and endorsed by the payee to the plaintiff, the other partners have a right to show, that the note was fraudulent in its inception and was fraudulently put into circulation; which being established will throw the burden of proof upon the plaintiff to show that he came by the note fairly and without knowledge of the fraud. *Munroe* v. *Cooper*, 5 Pick. 412; Chitty on Bills, (Philad. ed.) 42, note *a*; *Solomons* v. *Bank of England*, 13 East, 134, note; *Woodhull* v. *Holmes*, 10 Johns. R. 231.

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counsel contended that the note, being negotiable, was in law payment for the lard; but as it appeared that the contract was made in New York and was to have been performed there, and as it was admitted that by the law of New York, as laid down in reported cases, the note would not amount to payment, the jury were instructed to find for the plaintiff, if they should be satisfied that the note had never been paid and that it was actually lost; and they accordingly found a verdict for the plaintiff.

If the Court should be of opinion that on this evidence the plaintiff was not entitled to recover, the verdict was to be set aside and the plaintiff was to become nonsuit; unless the Court should be of opinion that the motion to amend ought to have been allowed.

March 10*th.* *Morse*, for the defendants, insisted that the giving of the note was a payment; *Thacher* v. *Dinsmore*, 5 Mass. R. 302, and that the plaintiff's having given a receipt stating that the note was received in full for the lard, was an agreement that the note should be considered as payment, which even according to the law of New York would be a discharge of the previous simple contract debt.

J. C. Merrill, *contrà*, cited on this point, *Porter* v. *Talcott*, 1 Cowen, 359; *Holmes et al.* v. *D' Camp*, 1 Johns. R. 34; *Thompson* v. *Ketcham*, 8 Johns. R. 149; *Pintard* v. *Tackington*, 10 Johns. R. 104; *Burdick* v. *Green*, 15 Johns. R. 247; *Tobey* v. *Barber*, 5 Johns. R. 68; and he contended that the writ was amendable, for the note and the account were for the same cause of action, at least by the law of New York, and the amendment would not have prejudiced any third party. *Willis* v. *Crooker*, 1 Pick. 204; *Haynes et ux.* v. *Morgan*, 3 Mass. R. 208.

March 11*th.* PARKER C. J. gave an opinion of the Court in substance as follows. It is very clear that by the decisions of this Court, a few years since, in the cases of *Little* v. *Little*, in Essex, and *Tappan* v. ———, in Hampshire, not reported, the amendment could not be allowed, for the note and the account were substantially different causes of action.[1] What may be the

[1] *Fairfield* v. *Baldwin*, 12 Pick. 388; *Morton* v. *Fairbanks*, 11 Pick. 368

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.aw of New York on this point it is unnecessary to determine, for we are clear that the action may be sustained without the amendment. The contract having been made in New York with reference to their laws, it is to have the same effect here wh'ch it would have there,[2] and it is manifest from a series of cases in the Reports of that State, that the note, being lost, cannot be viewed as an extinguishment of the antecedent debt, unless it were so expressly agreed, and that the receipt given by the plaintiff does not amount to such an agreement.[3] *Burdick* v. *Green*, 15 Johns. R. 247; *Tobey* v. *Barber*, 5 Johns. R. 68.

Judgment according to the verdict.

Ball v. *Claflin*, 5 Pick. 303; *White* v. *Snell*, 5 Pick. 425; *Swan* v. *Nesmith*, 7 Pick. 220; *Tenny* v. *Prince*, 4 Pick. 385; *Stone* v. *Swift*, 4 Pick. 389; *Eaton* v. *Whitaker*, 6 Pick. 465; *Holmes* v. *Holmes*, 2 Pick. 23; *Clark* v. *Lamb*, 6 Pick. 512; *Haynes* v. *Morgan*, 3 Mass. R. 208; *Brigham* v. *Este*, 2 Pick. 425, *Miller* v. *Clark*, 8 Pick. 412; *Phillips* v. *Bridge*, 11 Mass. R. 246; *Bean* v *Parker*, 17 Mass. R. 603; *Mooney* v. *Kavanah*, 4 Greenl. 277; *M'Lellan* v. *Crofton*, 6 Greenl. 307, 328; *Bogart* v. *M'Donald*, 2 Johns. Cas. 219; *Putnam* v. *Hall*, 3 Pick. 445; *Bell* v *Austin*, 13 Pick. 90.

[2] Story's Conflict of Laws, 274; *Wallace* v. *Agry*, 4 Mason, 344; *Descadillas* v. *Harris*, 8 Greenl. 298.

[3] *Van Ostrand* v. *Reed*, 1 Wendell, 424; *New York State Bank* v. *Fletcher*, 5 Wendell, 85; *Hughes* v. *Wheeler*, 8 Cowen, 77; *Glenn* v. *Smith*, 2 Gill & Johns. 493; *Booth* v. *Smith*, 3 Wendell, 66. This seems also to be the true doctrine of the common law. *Puckford* v. *Maxwell*, 6 T. R. 52; *Orcenson* v. *Morse*, 7 T. R. 64; *Kearslake* v. *Morgan*, 5 T. R. 513; *Roades* v. *Barnes*, 1 Burr. 9; *The King* v. *Dawson*, Wightwick, 32; Chitty on Bills, (6th ed.) 97 to 100; *Hedwen* v. *Mendizabel*, 10 Moore, 477; *Bunney* v. *Poyntz*, 1 Neville & Manning, 229; *Putnam* v. *Lewis*, 8 Johns. R. 389; *Johnson* v *Weed*, 9 Johns. R. 310; *Pintard* v. *Tackington*, 10 Johns. R. 104; *Holmes* v. *De Camp*, 1 Johns. R. 34; *Sheeky* v. *Mandeville*, 6 Cranch, 253; *Wallace* v. *Agry*, 4 Mason, 336; *Elliot* v. *Sleeper*, 2 N. Hamp. R. 525; *Cheever* v. *Mirick*, 2 N. Hamp. R. 376; *Dennie* v. *Hart*, 2 Pick. (2d ed.) 205, note (1); *Chastain* v *Johnson*, 2 Bailey, 574; *Bill* v *Porter*, 9 Connect. R. 23; *Hutchins* v. *Olcott*, 4 Vermont R. 549. So of the Civil law. 1 Domat, 515, *bk.* 4, *tit.* 3. § 1. So of the Scotch law. Thompson on Bills, 192 to 194. A different rule has been adopted in Massachusetts and Maine. In those States, however, the taking of such security seems to be only *primâ facie* evidence of an absolute payment; the fact is open to explanation. *Descadillas* v. *Harris*, 8 Greenl 298; *Maneelcy* v. *M'Gee*, 6 Mass. R. 143; *Goodenow* v. *Tyler*, 7 Mass. R. 36, *Johnson* v. *Johnson*, 11 Mass. R. 359; *Chapman* v. *Durant*, 10 Mass. R 47, *Varner* v. *Nobleborough*, 2 Greenl. 121; *Greenwood* v. *Curtis*, 4 Mass. R. 93, *Whitcomb* v. *Williams*, 4 Pick. 228, *Watkins* v. *Hill*, 8 Pick. 522; *Reed* v *Upton*, 10 Pick 525 *Wood* v. *Bodwell* 12 Pick. 269, 270.

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ANONYMOUS.

The *St.* 1797, *c.* 35, § 8, respecting depositions *in perpetuam*, has reference o such only as are taken within this State.[4]

Whether it is within the discretionary power of the Court to admit as a foreign depo sition one taken *in perpetuam*, in another State, before any action was pending, *quære.* But such a deposition will not be admitted without proof that the adverse party will not be prejudiced by its admission.

March 7th. IN the case of a libel for a divorce, *J. T. Austin*, on the part of the libellant, offered in evidence a deposition *in perpetuam*, taken in the State of Maine before the libel was pending and without notice to the libellee.

Austin urged that it was admissible as a deposition *in perpetuam*, taken pursuant to *St.* 1797, *c.* 35, § 8; or that at least the Court might, within their discretionary power, admit it as a foreign deposition; or that it might be viewed as a judicial proceeding pursuant to the statute of Maine, which is similar to our own, and so it would be entitled to full faith and credit here by the constitution and laws of the United States; and that if a deposition *in perpetuam* could not, under our
15 statute, be taken in another State, a party would have no means of perpetuating the testimony of a witness living in such State.

March 11th. But *per Curiam*. A deposition taken in another State has no force here as a deposition *in perpetuam*. Our statute applies only to such as are taken within this State. As this deposition was taken before the libel was pending, we are doubtful whether it is within the discretionary power of the Court to admit it as a foreign deposition. But in a case like this we ought to have some evidence that the adverse party would not be prejudiced if the deposition were admitted. We do not know that he was not within reach of notice.[1] The deposition cannot be received in evidence.

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[4] The mode of taking depositions *in perpetuam* out of the State, and the manner in which they are to be used within the State, are regulated by the Revised Statutes, *c.* 94, § 40, *et seq.*

See *Welles* v. *Fish*, *post*, 74.

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The President &c. of the STATE BANK *versus* TITUS WELLES, Executor of Abraham Touro.

An action was brought against two obligors in a joint and several bond. One died and his death was suggested on the record, and the action proceeded against the other. *Held*, that a separate action might be sustained against the executor of the deceased, while the first action was pending against the survivor.

DEBT on a joint and several bond made by Edward V. Baxter, Thompson Baxter, and the defendant's testator, conditioned that E. V. Baxter should faithfully discharge his duties as a teller of the State Bank.

The defendant pleaded in abatement, that an action for the same cause had been commenced in the Court of Common Pleas against Touro and T. Baxter as survivors of E. V. Baxter, had been brought into this Court by appeal, and had been continued from term to term till November term 1822, when Touro having deceased his death was suggested on the record, and had since been prosecuted in this Court against T. Baxter as survivor of Touro and E. V. Baxter, and yet remained undetermined.

General demurrer.

D. Davis and *J. T. Austin*, in support of the demurrer, referred to 1 Chit. Pl. 30, 37; *Eccleston* v. *Clipsham*, 1 Wms's Saund. 153, note; *Enys* v. *Donnithorne*, 2 Burr. 1190; *Stratfield* v. *Halliday*, 3 T. R. 782; Bac. Abr. *Obligation*, *D*, 4. *March* 14th

Bliss, *contrà*, said that actions upon a joint and several obligation should be brought against all the obligors together, or against each one severally. The first suit was brought on the joint contract, and the plaintiff cannot sue severally while the joint suit continues pending. The only question is, whether that suit may not be considered as pending against one only, the other two obligors being deceased; and it cannot be so considered, for it is against him as survivor; the declaration is on the joint contract. He cited *Commonwealth* v. *Churchill*, 5 Mass. R. 174; *Commonwealth* v. *Cheney*, 6 Mass. R. 347; Bac. Abr. *Abatement*, *M*, and *Obligation*, *D*; *Earl of Bedford* v. *Bishop of Exeter*, Hob. 137; *Rawlinson* v. *Oriett*, 16

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Carth. 96; *Lilly* v. *Hedges*, 1 Str. 553; *S. C.* 8 Mod. 166; *Peters* v. *Davis*, 7 Mass. R. 257; *Austin* v. *Walsh*, 2 Mass. R. 405; *Spalding* v *Mure*, 6 T. R. 364.

March 15th. PARKER C. J., in giving the opinion of the Court, said in substance, it was clear that though the right of action survived against the executor of Touro, it would have been impossible to summon in the executor in the first action, for there would then have been defendants in different capacities, and the judgment must have been against one *de bonis propriis* and against the other *de bonis testatoris*.[1] The question then is, whether the decease of Touro may be considered as a severance, so that the plaintiff may bring his action against the executor at the same time that the first suit is pending. There is no question but that the obligee may sue all the obligors severally on a joint and several obligation;[2] the objection here is, that the first suit is pending against one in his capacity of surviver.[3] We have however come to the conclusion, that the proceedings on record now show a severance, and that the action against the executor may be sustained. We see no objection to such a course on the ground of inconvenience. Enough appears on record to show that the proceedings in the first suit have ceased to operate jointly. The judgment would be against the surviver alone, and could not be pleaded in bar to an action against the executor.

17 We do not see any authority which contradicts this decision. The case of *Spalding* v. *Mure*, 6 T. R. 364, which was relied on, determined only that a defendant should not be held to bail on an affidavit of a debt due from three defendants

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[1] Toller on Executors, 475; *Hall* v. *Huffam*, 2 Lev. 228; Carth. 171; *Coffin* v. *Cottle*, 4 Pick. 454.

[2] See *Cutter* v. *Wittemore*, 10 Mass. R. 442; *Carter* v. *Carter*, 2 Day, 442; 1 Wms's Saund. 154, *n.* (1); Poph. 16; *Rogers* v. *Danvers*, 1 Freem. 128. On a note given by several for a sum to be paid in the following proportions, viz. ½ by A. ⅛ by B, ⅛ by C, &c., several actions must be brought by each, and not a joint action against all. *M'Bean* v. *Todd*, 2 Bibb, 320.

[3] It is not unusual to declare against the survivor as such, noticing the death of his co-obligor, or co-partner. Per *Le Blanc* J., 2 Maule & Sel. 25. But the survivor or his executor may be declared against without noticing the first deceased party. *Richards* v. *Heather*, 1 Barn. & Ald. 29; *Calder* v *Rutherford*, 3 Brod. & Bingh. 302; *Raborg* v. *The Bank of Columbia*, 1 Harr & Gill, 231; *Goelet* v. *M'Kinstry*, 1 Johns. Cas. 405

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as surviving partners of another deceased, when the declaration was for a debt due from the three defendants alone. There is no doubt of the correctness of that decision, but it does not touch the point in question.

Respondeas ouster.

GAMALIEL BRADFORD *versus* THOMAS ROWE.

The warden of the State prison brought an action, pursuant to *St.* 1813, *c.* 47, §, upon a contract relative to the employment of convicts within the prison, and died pending the suit. It was *held*, that neither his successor nor executor could be compelled to prosecute the suit, and that the defendant's remedy for his costs was by application to the legislature. [1]

BRADFORD, warden of the State prison, commenced this action on a contract made between him as warden, and the defendant, relative to the employment of convicts within the prison, in conformity to *St.* 1813, *c.* 47, § 1. This statute provides, that "all contracts &c. shall &c. be made by and with the warden &c. for the time being, and with his succes sors in office, and any such contract may be prosecuted &c. in the name of said warden; and if, during the pendency of any such suit, the warden should die, &c., the successor &c. may be admitted to prosecute the same, and such suit shall not, by such death, &c., abate."

Pending the action Bradford died, and Thomas Harris was appointed warden and entered on the duties of the office. The defendant cited Harris into court to take upon himself the prosecution of the suit. Harris thereupon appeared and disclaimed all knowledge or interest in the subject matter of the suit, and prayed that the citation might be considered as improvidently issued and that he might be discharged.

The question was, whether Harris was liable to pay the defendant's costs.

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[1] But under the Revised Statutes the successor of the warden has the right, or may be compelled by the adverse party, to prosecute or defend the suit, so commenced by his predecessor. Revised Stat. *c.* 144, § 19.

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Bradford v. Rowe.

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The case was argued by *J. T. Austin* on the part of Harris, and *H. Orne* on the part of the defendant.

PARKER C. J., in giving the opinion of the Court, said the statute provides only that the successor may be admitted, not that he shall be compelled, to prosecute the suit, and it is very clear that he was not bound to come into court and expose himself to a judgment. No action against the warden is given by the statute, and none would lie against him upon the contract, because he avowedly contracts as a public officer. *Hodgson* v. *Dexter*, 1 Cranch, 363; *Macbeath* v. *Haldimand*, 1 T. R. 172.[1] The expression in the statute, that the suit shall not abate, taken in connexion with the rest of the section, must mean that the defendant shall not have the suit abated when the successor wishes to proceed in the prosecution. The defendant's remedy for his costs must be by an application to the legislature.

In answer to a question by counsel, whether the executor of the deceased warden might not be liable, the *Chief Justice* said the Court had considered that point and they were of opinion that he was not liable. According to the statute none but the successor can have any relation to the contract.

Action dismissed.

Freeman v. *Otis*, 9 Mass. R. 272; *Dawes* v. *Jackson*, 9 Mass. R. 490; *Brown* v. *Austin*, 1 Mass. R. 208; *Walker* v. *Swartwout*, 12 Johns. R. 444; *Allen* v. *Waldegrave*, 8 Taunt. 566; *Gidley* v. *Palmerston*, 7 Moore, 91; *Rathbon* v. *Budlong*, 15 Johns. R. 1; *Adams* v. *Whittlesey*, 3 Connect. R. 560; *Stinchfield* v. *Little*, 1 Greenl. 231; *Hovey* v. *Magill*, 2 Connect. R. 680: *Mann* v. *Chandler*, 9 Mass. R. 335.

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CHARLES ELLIS *et al. versus* ELISHA WHEELER.

A *bonâ fide* holder for a valuable consideration of a check payable to bearer, addressed to no particular person, may recover in an action against the drawer for money had and received.

ASSUMPSIT upon a memorandum in writing as follows:— "Memdm. State Bank. No. 100 Dolls. cts. May 29, 1819. Pay to Capt. Cazneau or bearer one hundred dollars. Elisha Wheeler. To the cashier." The word State was cancelled by a line drawn through it. The declaration contained the usual money counts; also counts upon the memorandum as upon a promissory note, and as upon a bill of exchange. It was proved at the trial, that the memo- 19
randum came to the hands of the plaintiffs for a valuable consideration, about five years after it was made. A verdict was taken for the plaintiffs, subject to the opinion of the Court.

B. Parsons now contended, that the action could not be *March 11th.*
sustained upon either of the counts, and he cited *Saxton* v. *Johnson*, 10 Johns. R. 418; *Hodges* v. *Steward*, 1 Salk. 125; *Harris* v. *Huntbach*, 1 Burr. 373; *Ball* v. *Allen*, 15 Mass. R. 433; *Brown* v. *Gilman*, 13 Mass. R. 158; *Waynam* v. *Bend*, 1 Campb. 175; *Johnson* v. *Collings*, 1 East, 98; *Barlow* v. *Bishop*, ibid. 434; *Whitwell* v. *Bennett*, 3 Bos. & Pul. 559; *Houle* v. *Baxter*, 3 East, 177; Chitty on Bills (6th ed.), 364 *et seq.*

Gay, *contrà*, cited Bayley on Bills, 6; *Shuttleworth* v. *Stephens*, 1 Campb. 407; *Tatlock* v. *Harris*, 3 T. R. 174; *Grant* v. *Vaughan*, 3 Burr. 1516; *Ball* v. *Allen*, 15 Mass. R. 433.[1]

The *Court*, without expressing an opinion in regard to the *March 15th*

[1] *Cushing* v. *Gore*, 15 Mass. R. 69; *Franklin Bank* v. *Freeman*, decided at March term 1835, in Suffolk.

An instrument for the payment of money, not payable to any particular person or to bearer, is not negotiable; and it was accordingly held that a memorandum, made by a payee of a note for $2500, on the back thereof, in these words, "Mr. Olcott, pay on within $750," did not authorize a recovery on the money counts, by the holder against the payee. *Douglass* v. *Wilkeson*, 6 Wendell, 637.

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special counts, held, upon the authority of *Grant* v. *Vaughan* in particular, that the action was sustainable upon the count for money had and received, and they referred to *Bullard* v *Bell*, 1 Mason, 243, and the cases there cited, in corrobo ration of their decision. See also *Pierce* v. *Crafts*, 12 Johns R. 90.

Judgment according to the verdict.

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20 NATHANIEL GRIGGS *et al. versus* SAMUEL AUSTIN *et al.*

Freight is the compensation for the carriage of goods, and if it be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary.

Such an agreement cannot be implied, in case the goods should be lost by shipwreck, from the clause in the bill of lading, that they are to be delivered safely, the danger of the seas excepted, the design of that clause being only to save the master and ship-owner from being answerable for the value of the goods so lost.

Payment of freight beforehand and an advance of freight mean the same thing, and whether the whole or a part only be paid, is immaterial, as it respects the right to recover it back.

An agreement that the freight shall be no longer at risk after the goods shall have been received on board, cannot be implied from the mere fact of its having been paid in advance.

ASSUMPSIT for money had and received and for money lent and accommodated.

The plaintiffs, to maintain their action, offered to prove, that in November, 1822, they shipped on board the ship Topaz 904 barrels of apples, to be carried to the port of Liverpool, and that freight was paid in advance to the defendants, they being owners of the ship for the intended voyage; that no deduction was made from the usual freight on account of advance payment, and that there was no agreement that freight was to be allowed at all events; that the ship was stranded at Crosby, about six miles below the port of Liverpool, and that the greater part of the apples belonging to the plaintiffs was lost.

The defendants objected to this evidence, contending that the freight having been paid in advance, they were not liable to repay it, the apples having been lost without their fault

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and there having been no agreement to refund in case of such loss. Griggs Au- .n.

This objection the judge overruled, intending however to reserve the question. The plaintiffs accordingly proved the stranding of the vessel and the loss of the apples.

In the bill of lading it was expressed, that the apples were to be delivered "in the like good order and well conditioned, at the aforesaid port of Liverpool, the danger of the seas only excepted, unto Mr. William Graves [one of the plaintiffs] or to his assigns, he or they paying freight for the said goods nothing, being paid here." 21

The cause was argued at much length by *W Prescott* and *J. T. Austin* for the defendants, and *S. Hubbard* for the plaintiffs. The points raised will sufficiently appear in the opinion of the Court delivered by the chief justice. March 5th

On the part of the *defendants* were cited, *Watson* v. *Duykinck*, 3 Johns. R. 335; *Andrew* v. *Moorhouse*, 5 Taunt. 435; Dig. 19. 2. 15. 6; Dig. 14. 2. 10; *De Silvale* v. *Kendall*, 4 Maule & Selw. 37; *Manfield* v. *Maitland*, 4 Barn. & Ald. 582; *Gibbon* v. *Mendez*, 2 Barn. & Ald. 1 ; *Blakey* v. *Dixon*, 2 Bos. & Pul. 321; *Anon.* 2 Show. 291.

For the *plaintiffs* were cited, Abbott (Eng. ed.), 273; *Lane* v. *Penniman & Tr.*, 4 Mass. R. 91; *Maniter* v. *Buller*, 1 Campb. 84; *Watson* v. *Duykinck*, *ubi supra*; *Howland* v. *The Brig Lavinia*, 1 Peters's Adm. Rep. 126; Roccus, note 80, and Ingersoll's note; Inst. au Droit Marit. par Boucher, *p.* 264, *art.* 966.

PARKER C. J. This action is *indebitatus assumpsit* on money counts. It is brought to recover back a sum of money paid by the plaintiffs to the defendants for the freight of a number of barrels of apples taken on board their ship, the Topaz, bound from Boston to Liverpool. It is proved by the bill of lading signed by the master, and an account made out by the owners, with their receipt upon it, that the whole freight agreed upon was paid before the sailing of the vessel, and the report finds, that before the vessel arrived at her port of delivery abroad, she was stranded or wrecked on a beach within six miles of her port, by means of which a large portion March 16th

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o the plaintiffs' apples were destroyed, or rendered worthless by the salt water.

This brief statement presents the principal question which has been argued; there are other facts in the report material to some inferior questions, which will be stated in their proper place.

The plaintiffs contend, that the consideration for the payment of the money was the agreement on the part of the own-
22 ers to transport the apples in their ship to Liverpool; and that having failed to do this, they are bound in conscience to return the money; and that an action at law lies for it, upon the ground of failure of consideration. The defendants insist, that the payment of the freight in advance imposes all risks upon the owner of the goods, and that the failure of transportation and delivery having happened without their fault, there is no legal nor equitable principle which will oblige them to refund. Some reliance in support of their defence is placed upon the condition expressed in the bill of lading, that the goods are to be delivered safely, "the dangers of the seas excepted;" but as this condition has in practice been applied only to the contract in relation to the goods themselves, so as to protect the ship-owner from a demand for their value in case of loss by perils of the sea, and has never been construed to bear upon the rights of the parties in relation to the freight, we cannot see any thing in that instrument which can affect the question before us. This must stand upon the principles of marine or mercantile law, so far as they may have been recognised and adopted, or may be found agreeable to the rules and maxims of the common law.[1]

It is certainly a clear principle of the common law, that when money is paid or a promise made by one party in contemplation of some act to be done by the other, which is the sole consideration of the payment or promise, and the thing stipulated to be done is not performed, the money may be recovered back, or the promise founded on such consideration

[1] Whether ship-owners are entitled to retain money received on account o freight, is clearly a question not for the jury, but for the court, under the cir cumstances of each case. *Wirgman* v. *Mactier*, 1 Gi. & Johns 150.

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may be avoided between the parties to the contract. This general principle is the foundation of perhaps the largest class of cases which have been sustained under the action for money had and received. Exceptions may be made by a stipulation of the parties, but without such exceptions the rule seems to be universal.

And this broad principle of justice has been adopted in the marine law, in relation to this subject of freight, upon the continent of Europe, as is very fully proved by the researches made and the cases cited by Chief Justice *Kent*, in the case of *Watson* v. *Duykinck*, 3 Johns. R. 335.

It would be but an affectation of learning to go over the 23
ground which has been so ably preoccupied in the opinion given in that case, especially as the same ground has been traversed by Mr. Justice *Story* in a note in his edition of Abbott on Merchant Ships &c., which note was avowedly supplied from the opinion of Chief Justice *Kent* above cited. I wish for one, since books are so prodigiously multiplied, to spare the profession and the public the expense of reiterated citations on points indubitably settled, when both text and comment may be found in almost every book in a lawyer's library. It is sufficient then to say, that by reference to the abovecited opinion and the note of Mr. Justice *Story*, it will be found to be the established law of the maritime countries on the continent of Europe, that *freight is the compensation for the carriage of goods, and if it be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary.*[1]

The commercial principle recognised by the continental nations is reduced into the form of a maxim in the Napoleon Code de Commerce, *tit.* 8, *art.* 302. "No freight is due for merchandise lost by shipwreck or stranding, plundered by pirates or taken by enemies. The master is bound to restore freight which shall have been advanced, if there is no agree-

[1] See *Samson* v. *Ball*, 4 Dallas, 459; *Giles* v. *Brig Cynthia*, 1 Peters's Adm. R. 203, 206, 207, note; *Cheriot* v. *Barker*, 2 Johns. R. 346; *Gillan* v. *Simpkin*, 4 Campb. 241; *Harris* v. *Rand*, 4 N. Hamp. R 259, 555; 3 Kent's Comm. (2d ed.), 226, 227.

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ment to the contrary." This, like most of the provisions in the modern French codes, is not the introduction of a new principle, but the new promulgation of antecedent law in a more convenient form, as was the case with the Digest and other works executed under the auspices of Justinian, of whom the emperor Napoleon was in this respect an imitator [2]

It is admitted in argument, that such is the law of the continental powers, but it is suggested that it has not been introduced into the English law, and therefore there is no evidence that it belongs to our common law. It is true there are few cases in the English books touching this point, but it is equally true that the principle has never been denied there; on the contrary, in the case cited from 1 Campb., Lord *Ellenborough*, who was a great mercantile judge, recognises it in the full extent of the Code de Commerce; and the cases cited from 4 Maule & Selw.,2 and 4 Barn. & Ald. and 5 Taunt., proceed upon the ground of a stipulation in the several contracts which were under discussion, similar to the exception in the continental rule above cited; and the *obiter* remark of Mr. Justice *Bayley*, in the case of *De Silvale* v. *Kendall*, that wherever there is an *express stipulation* that freight shall be paid in advance, there must be an express stipulation that it shall be recovered back if the goods be not carried, if such be the intention, will be found not to militate against the general principle.

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A distinction was raised in the argument, between payment of freight and an advance of it, it being supposed to be recoverable back in the latter case, but not in the former. But we do not find this distinction supported by authorities, nor do we see any sound reason for it. We think an advance of freight means the same thing as payment of freight beforehand or in advance, and whether the whole is paid or a part we think makes no difference.

In the English cases cited a very nice discrimination has been adopted between a contract for freight, which includes an obligation to transport and deliver, and a contract to receive

[2] Ord. de la Mar. *tit. Du Fret, art.* 18; Cleirac, Les Us. et Coutumes de la Mer, *p.* 42.

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the goods on board the vessel. That a contract of the latter nature may be made, so that it will be considered as executed by the mere lading of the goods, we do not doubt; but we cannot think that such a contract can be implied from the mere fact of the freight's being paid down, because reasons may and often do exist for exacting this, without any intention to vary the legal liabilities of the parties. If persons apply for a passage in a vessel, as is often the case between this country and Great Britain, whose responsibility may be doubtful, and they are received on board at the customary price on condition of advancing the passage money, and the vessel should be wrecked immediately on commencement of the voyage, so that the passengers would have to seek another vessel and pay their pas sage money again, we cannot think that the master or shipowner would have a right to retain the money, unless there were an express agreement to that effect. The case of *Watson* v. *Duykinck* above cited is somewhat of this nature. In 25 that case the voyage was broken up two days after its commencement, and the passenger, instead of being carried to the island of St. Thomas, was landed in Connecticut. He however was not allowed to recover back the passage money which had been paid in advance, on the ground that the consideration was an agreement on the part of the master to *suffer* him to proceed in the sloop &c., and that the master had suffered him to come on board, which was an execution of the contract. I confess this does not seem to me to be the most obvious effect of the contract; but it was by this construction only that the defendant prevailed, the court being clear that were it a common case of passage money paid in advance, by the principles of the marine law, engrafted into the common law, it must have been recovered back. The same principle applies with equal force to money paid in advance for the freight of goods.[1] Such payment does not import a relinquishment of any right, for it may have been exacted because the goods themselves might not be a sufficient security for the freight, and the owner of the goods might not be responsible.

[1] In general, freight and passage money are governed by the same rules. *Mulloy* v. *Backer*, 5 East, 316; *Howland* v. *Ship Lavinia*, 1 Peters's Adm. R 123, 125

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The case before us is likely to have been of that kind. Fruit was the subject of the contract; it was of a perishable nature and liable to great uncertainty as to its value in a foreign market; the owner of it may have been a person of no property; and for these reasons the payment down may have been exacted.

But one of the counsel for the defendant has put the case on ground which admits the general principle, that freight may be recovered back when the goods are not delivered, unless there be an agreement to the contrary, but he insists that such an agreement does appear from the evidence, that is, from the bill of lading and the receipt on the account. But we think they furnish no evidence of such an agreement; they merely prove that the freight was paid in advance.

Indeed it will be seen at once, that if the payment of freight thus proved were to be construed into a stipulation that it should not be recovered back, the whole doctrine of the marine
26 law on this subject would be useless. The maxim is, that freight paid in advance, if the goods be not carried, shall be returned, unless there be a stipulation to the contrary. Now if the mere payment proved such stipulation, there would be no case for the rule to operate upon. So that when Mr. Justice *Bayley* says, that where there is an express stipulation to pay freight in advance, there must also be an express stipulation to pay it back in order to entitle the shipper to recover, he means something more than the mere payment of the freight, which may be equivocal. He means undoubtedly an express stipulation in the contract, because it might be inferred from such a stipulation, that the parties had calculated hazards, and that an equivalent had been obtained in some form for the advance of money which otherwise would be due only on a contingency. And he was there reasoning upon a case which might fairly sustain such an argument.

It is said that the rate of exchange between this country and England gave an advantage to the plaintiffs which may have been the consideration for paying freight in advance. That fact does not appear in the report, and if it did it could not affect our decision. If the intent of the parties had been submitted to the jury, as was done by Chief Justice *Gibbs* in the

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case cited from 5 Taunt. 435, it might have been material, but we do not find that the fact was offered to be proved at the trial, so that we do not see that any use can now be made of it.

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Judgment for the plaintiffs.

COMMONWEALTH *versus* REUBEN HARRINGTON.

Exciting, encouraging, and aiding a person to commit a misdemeanor, is of itself a misdemeanor.

Thus, letting a house to a woman of ill fame, knowing her to be such, with the intent that it shall be used for purposes of prostitution, is an indictable offence at common law.

The time when such contract is alleged in the indictment to have been made, is immaterial.

THE defendant was indicted for letting out and accommodating a part of a house to one Susan Bryant, with the intent that the business of prostitution should be carried on therein. 27
The house was owned by the defendant but not occupied by him. The indictment alleged that he did, on a certain specified day, let out and accommodate this house for the purpose mentioned, and that it was afterwards in fact used for that purpose.

There was no evidence to prove any express agreement that the house should be thus used, but there was evidence that the lessee was a woman of ill fame, and that the defendant knew it when he let the house. The letting was not until some months after the time mentioned in the indictment.

It was contended on the part of the defendant, that it was incumbent on the government to prove an express illegal agreement, and to show that it was made at the time charged in the indictment; and further, that the facts set forth in the indictment did not constitute an offence, either at common law or by statute.

A verdict was taken against the defendant, subject to the opinion of the Court upon these points.

Dunlap now contended that the whole offence, if any, committed by the defendant, consisted in making an illegal contract, and the contract should be set out truly in the

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indictment, and be proved as alleged; as in a penal action upon the statute of usury, where the variance as to the time is fatal. *Carlisle, qui tam*, v. *Trears*, Cowp. 671. All the acts of the defendant terminate with the completion of this contract, and if it was a legal contract the subsequent illegal acts of a person over whom he has no control cannot make it illegal, any more than the subsequent virtuous acts of such person could remove the taint if it had been an illegal contract.

But the strong point in the case is, that this act of the defendant does not constitute an offence at law. It is not prohibited by any statute, and there is no precedent, until within a year or two, of an indictment at common law for such an offence; and yet similar immoral acts must have constantly occurred in large cities, both in this country and in England,
28 for a long period of time. There was no express agreement that the house should be used for an unlawful purpose, and proof of a knowledge that it would probably be so used will not support an allegation of an agreement, nor will it show that any offence was committed. *Holman* v. *Johnson*, Cowp. 341. In *Lloyd* v. *Johnson*, 1 Bos. & Pul. 340, the plaintiff who had washed clothes for the defendant, knowing her to be a prostitute, was allowed to recover for her services, for it was said that such a woman must have clean linen, and it was impossible for the court to take into consideration which of the articles washed were used by the defendant to an improper purpose, and which were not. So here the lessee must have a lodging, and it is impossible to say how far the house was used for a shelter, and how far for improper purposes. It is not enough that a man's acts encourage lewdness, or that he is lewd himself; the indictment should be for keeping a bawdy-house, and that is an offence personal to the actual master or mistress of such a house, and does not extend to the mere lessor. *Rex* v. *Pierson*, 2 Ld. Raym. 1197; *Regina* v. *Williams*, 1 Salk. 383; Russell on Crimes, 432, 436; *Commonwealth* v. *Dean*, 1 Pick. 387. If the act of the defendant was injurious to the community, it will be easy for the legislature to make a statute upon the subject, as was done in regard to obtaining goods by false pretences; which was not indictable before the statute of 1815, c. 136, although it was morally

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as great an offence as the one charged in this indictment. *Commonwealth* v. *Warren*, 6 Mass. R. 72. Commonwealth v. Harrington.

J. T. Austin, County Attorney, contended that it was not necessary to prove the precise day on which the agreement is alleged to have been made. 1 Chit. Crim. Law, 123. Such proof is required only where time enters into the nature of the offence, as it does in the case of usury. It would be impossible for the government to ascertain when such an agreement as the one in question was entered into. It was not necessary to allege or prove an express agreement that the house should be used for the purposes of prostitution; it was sufficient to prove by circumstantial evidence an implied agreement. The criminal intent is found by the verdict.

Whether the facts set forth in the indictment constitute an 29
indictable offence, is a question of great consequence to the public. The defendant is charged with enabling and encouraging another person to do an act which is a common nuisance; an offence against the public, tending to the annoyance of the community. 1 Hawk. P. C. *c.* 75, § 1. Making the agreement was a gross offence against public morals, and though it may have been such an act as has never been prosecuted before, yet if it comes within the general principle, the indictment may be sustained. In *Girardy* v. *Richardson*, 1 Esp. R. 13, Lord *Kenyon* ruled, that *assumpsit* for use and occupation would not lie where the premises were let for a purpose *contra bonos mores*.

PARKER C. J. said, in substance, that the Court were of *March 24th.*
opinion that there was nothing in the first objection to the conviction, namely, that the lease was not proved to have been made on the day alleged in the indictment.[1] Time does not enter into the constitution of the offence, and this case differs therefore from an indictment for usury, where it is necessary to set forth the time of making the usurious contract.

The principal objection however was, that the facts alleged do not constitute an indictable offence. It is found that the

[1] See *Treharne's Case*, 1 Moody, 298; *State* v. *Haney*, 1 Hawks, 460; *Jacobs* v. *Commonwealth*, 5 Serg. & Rawle, 316; *United States* v. *Stevens*, 4 Wash. C C. R. 547.

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defendant let his house to a woman of ill fame, knowing her to be such, with the intent that it should be used for the purposes of prostitution, and that it was so used. There is no statute against such an offence, and the question then is, whether it is indictable at common law. It has been compared to cheating on false pretences, which was not indictable at common law, and which has been made so by a statute. But the cases are different, inasmuch as cheating acts only upon the individual defrauded; whereas this offence is of a public nature, and obviously injurious to the public morals. The real question is, whether exciting, encouraging, and aiding one to commit a misdemeanor, is not of itself a misdemeanor. And we find that it has been held so to be, in the case of *The King* v. *Phillips*, 6 East, 464, in which it was decided, that an endeavour to provoke another to commit the misdemeanor of
30 sending a challenge to fight, is itself a misdemeanor; it being the object of the law to prevent the commission of offences On this ground we think the indictment is sustainable. In *Rex* v. *Scofield*, Cald. 397, it was held that the intent may make an act, innocent in itself, criminal. To apply this principle to the present case. The letting of a house is in itself an innocent act, but the defendant let his house for the purposes of prostitution, and he knew that it was used accordingly. Now keeping a bawdy-house was an offence at common law,[1] and letting a house for such purpose must therefore be a misdemeanor.

A case has been cited, in which a party was allowed, in a civil action, to recover a compensation for washing clothes for the defendant, although the plaintiff knew that the defendant was a prostitute, and that the clothes were used for the purposes of allurement. But this indictment goes further. It alleges, not only that the defendant knew that his house would be put to an unlawful use, but that he let it for that very purpose. And there is a case in 1 Esp. R. 13, (*Girardy* v. *Richardson*,) in which Lord *Kenyon* held that a party letting his house for such a purpose is not enlitled to recover rent.[2]

[1] *Rex* v. *Higginson*, 2 Burr. 1232; *Rex* v. *Rogier*, 1 Barn & Cresw. 272 *Hunter* v. *Commonwealth*, 2 Serg. & Rawle, 298; *Commonwealth* v. *Stewart* 1 Serg. & Rawle, 342; *Darling* v. *Hubbell*, 9 Connect. R. 350.

[2] *Lloyd* v. *Johnson*, 1 Bos & Pul. 340; *Dyett* v *Pendleton*. 8 Cowen. 737

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The King v. *Higgins*, 2 East, 5, is a strong case to show that the common law will, *proprio vigore*, punish in a case like the one before us. There a man solicited a servant to steal his master's goods, and it was held a misdemeanor to solicit a person to commit a crime.[3]

It being found here that the defendant's house was let to be used for an unlawful purpose, and that his gain was founded upon such use of it, the Court do not think a statute necessary to make his offence indictable. The only case which looks to the contrary is the one in 2 Ld. Raym. 1197, where an indictment against a person for being a bawd was held ill, that being a spiritual offence. The reason does not hold here, as we have no spiritual court, and it does not appear that a person may not here be indicted for being a bawd.

Though we had strong doubts in this case, from the argument of Mr. *Dunlap* and from the circumstance that no case has been found of an indictment for this offence in England, we have nevertheless come to the conclusion, that there is no objection to this indictment on the ground of variance, and that the facts set forth constitute an indictable offence.

Defendant adjudged to pay a fine, with costs of prosecution.

[3] So procuring, or endeavouring to procure, the seduction of a girl, seems indictable. 3 St. Tri. 519. So endeavouring to lead a girl into prostitution. *Rex* v. *Delaval*, 3 Burr. 1438. The mere solicitation of chastity is not indictable. Hawk. P. C. *bk.* 1. 74, § 1. See *contrà*, however, in *The State* v. *Avery*, 7 Connect. R. 267

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COMMONWEALTH *versus* JAMES BIGELOW

Whether any entry on land by virtue of an extent, although the execution be extended on the land of a person not a party to it, will sustain a process of forcible entry and detainer, *quære.*[1]

The possession of a tenant at will is not the possession of the lessor so as to enable him to maintain forcible entry and detainer against a stranger for expelling the tenant.

Where a writ of restitution in a process of forcible entry has been executed, and the proceedings are afterward quashed upon *certiorari*, this Court have power to award a writ of re-restitution.

BIGELOW obtained a judgment, at November term 1821 of this Court, against one Winslow, and took out his execution, which was delivered to an officer to be extended on Winslow's real estate. On the 16th of February, 1822, the officer extended it on certain real estate which was in the occupation of Winslow as a tenant at will under one Russell, and delivered peaceable seisin and possession of it to Bigelow. A process of forcible entry and detainer was thereupon sued out against Bigelow on behalf of Russell, before two justices of the peace, pursuant to *St.* 1784, *c.* 8, and a writ of restitution was awarded, by virtue of which Russell was put into possession of the real estate in question. At March term 1824, Bigelow presented a petition for a writ of *certiorari* to the two justices, to whose proceedings several exceptions were taken.

July 7th, 1824. *K Whitman* and *Rand*, for the respondent, insisted that the process of forcible entry and detainer was not a proper remedy against one claiming title under an extent of an execution; but that if there was any forcible entry and detainer in the case, it was against Winslow, the tenant, and not against Russell, who was not in possession nor entitled to the immediate profits of the land.

32 *Prescott* and *W. Phillips*, *contrà*, contended that if a man finds another out of his house and thereupon enters and prevents the other from returning, it is a forcible entry. 1 Hawk. P. C. *c.* 64, § 26, 27. Under our statute, either Russell, or

[1] See Revised Stat. *c.* 104, § 2.

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the tenant, or any person who is injured, may make the complaint. The possession of Bigelow as tenant at will was the possession of Russell, so far as it respects this process; which is not given for damages for personal wrongs, but for a restitution to the real estate. *Commonwealth* v. *Dudley*, 10 Mass. R. 403; 2 Bl. Comm. 290; 2 Rol. Abr. 80, *Indictment*, *M.* Bigelow by his levy could take only what belonged to his debtor; as against Russell the levy was wholly inoperative. *Gore* v. *Brazier*, 3 Mass. R. 538; *Bott* v. *Burnell*, 9 Mass. R. 99. Commonwealth v. Bigelow.

At this term the *Chief Justice* said the Court were inclined to doubt whether forcible entry and detainer could be maintained, where the entry was under a judgment and execution; and also whether this process could be maintained on behalf of Russell, since it appeared that Winslow, and not Russell, was the person turned out of possession. *March 4th*, 1825.

The case was thereupon again spoken to by the counsel for the prosecution, and the next day the *Court* ordered the proceedings to be quashed, on the ground last suggested by the *Chief Justice*.[1] *March 5th.*

The respondent then moved for a writ of re-restitution; to which it was objected, that the statute makes no provision for such a writ, but only says that the proceedings may be quashed. *Rand* answered that it would be nugatory to quash the proceedings unless such a writ should be granted, and that in many instances where the statutes give a remedy, without providing for a writ by which it is to be effected, the Court nevertheless award a suitable process.[2] He referred to *Rex* v. *Jones*, 1 Str. 474; Com. Dig. *Forceable Entry*, *D*, 5, where *March 8th*

[1] Forcible entry lies only for one, who has had actual possession. *Childress* v. *M'Gehee*, 1 Minor, 131. Tenant at will may maintain it *M'Donald* v. *Gayle*, 1 Minor, 98; *The People* v. *Van Nostrand*, 9 Wendell, 50; *The People* v. *Reed*, 11 Wendell, 157. The question of title cannot be tried in this action. *The People* v. *Godfrey*, 1 Hall, 240; *Dutton* v. *Tracy*, 4 Connect. R. 79. See *Bliss* v. *Bange*, 6 Connect. R. 78. In order to constitute a forcible entry the possession must not be *scrambling*, but quiet, peaceable and actual, and the entry must be accompanied by actual force or intimidation. *Commonwealth* v. *Keeper of the Prison*, 1 Ashmead, 140; *Bird* v. *Bird*, 2 Root, 411; 3 Chitty Crim. Law, 1135, 1136, *in notis*.

[2] Revised Stat. *c.* 81, § 6; Howe's Pract. 51 to 53

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Sav. 68, and 2 Cro. 151, are cited; *The People* v. *Shaw*, 1 Caines's R. 125; *The People* v. *King*, 2 Caines's R. 98; *Cooke* v. *Gibbs*, 3 Mass. R. 196.

At a subsequent day a writ of re-restitution was awarded.[3]

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33 ISAAC LIVERMORE *et al. versus* ISRAEL HERSCHELL *et al.*

In an action on the case in the nature of a conspiracy, against three, for obtaining goods upon credit by false and fraudulent representations, evidence that such representations were made by one alone in pursuance of a previous agreement and confederacy to that effect with the other two, but in their absence, will sustain a declaration charging them all with having made the representations.

A judgment on the merits in such action is conclusive on the parties, and is a bar to any new action in a different form.

THIS was an action on the case against Israel Herschell, Jacob Myers, and Isaac Joseph, for making false and fraudulent representations in order to induce the plaintiffs, and by which they were induced, to sell goods to Herschell on credit.

The second count alleged, that "Herschell, Myers, and Joseph, at &c., maliciously and wickedly contriving and intending, for their own lucre and gain, to injure, cheat, and defraud the plaintiffs, did then and there falsely and fraudulently say, represent, and declare to the plaintiffs, &c., [setting forth the pretences by reason of which the plaintiffs were induced to part with their goods, and denying the truth of such pretences,] and so the plaintiffs say they have been cheated and defrauded by reason of said false and fraudulent representations so by said defendants made, and have wholly lost their said goods," &c.

There was a third and a fourth count which the defendants contended were not properly in the case.

Herschell was defaulted. The two other defendants pleaded severally not guilty.

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[3] Roscoe's Crim. Ev. 379. See also *Matter of Shotwell*, 10 Johns. R 304 But see *Bird* v. *Bird*, 2 Root, 411.

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At the trial, which was before *Parker* C. J., there was no evidence that either Myers or Joseph made any representations to the plaintiffs, nor was either of them present when the goods were purchased, or at any other time; but there was evidence tending to prove an intimacy and connexion between the three defendants, and a knowledge of the purchase made by Herschell, and a participation in the disposition of the goods after they were purchased.

34

The jury were instructed, for the purpose of obtaining a verdict upon the facts, that if they were satisfied from the evidence, that there had been, previous to the purchase, an agreement or confederacy between both Myers and Joseph, or either of them, and Herschell, to cheat and defraud the plaintiffs by such representations as were set forth in the declaration, and which were proved to have been made by Herschell, and that it was part of the agreement and confederacy that Herschell alone should make the representations, they might find both or either of them guilty, according as the evidence might apply to both or either; but that unless they were thus satisfied they must acquit them, even though they should be satisfied that after the purchase they assisted Herschell in fraudulently disposing of the goods and shared with him in the proceeds.

A verdict having been returned against both Myers and Joseph, they moved for a new trial on the ground that the verdict was against law.

March 22d

S. D. Parker and *J. T. Austin* now contended that the verdict ought to be set aside, because evidence had been admitted to prove a conspiracy, when no conspiracy was set out in the declaration. This is not an action of conspiracy or in the nature of conspiracy, but an action of the case for making fraudulent representations. These are distinct causes of action, and are to be set out accordingly. In conspiracy the agreement to defraud is the crime, whether any act is done in pursuance of it or not; and this was indictable at common law. The offence in the other case consists in getting the goods upon the false and fraudulent pretences; which was not indictable until *St.* 1815, *c.* 136, was passed. Other distinctions might be pointed out *Regina* v. *Best*, 2 Ld. Raym. 1167;

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S. C 1 Salk. 174; *Robinson's case*, 1 Leach, (3d ed.) 44, *Commonwealth* v. *Warren*, 6 Mass. R. 72, 74; *Commonwealth* v. *Judd*, 2 Mass. R. 329; *The King* v. *Mason*, 2 T. R. 581; *Subley* v. *Mott*, 1 Wils. 210. There is a difference between making fraudulent pretences and causing them to be made; and great nicety is required in setting out such pretences so that the allegations and the proof may correspond.

35 *Rex* v. *Douglass*, 1 Campb. 212; *Rex* v. *Plestow*, ibid. 495; *Rex* v. *Perrott*, 2 Maule & Sel. 379. No case goes further than that of *Rex* v. *Young et al.*, 3 T. R. 98, in imputing to one the fraudulent pretences of another, and there all the defendants were present when the pretences were made. 3 Chit. Crim. Law, 999. A conspiracy may be proved from the several acts of the parties at different times, but in an action for obtaining goods on a joint fraudulent misrepresentation, only the *res gestæ* at the time are admissible in evidence. A false affirmation is a several act, and two persons cannot be indicted together for perjury; *Rex* v. *Phillips*, 2 Str. 921; and yet if a suborner should be joined in such an indictment with the person who actually makes the false affirmation, the maxim, *qui facit per alium* &c., would apply with as much force as in the case before the Court. An *acquittal* of the defendants, in this action, would not be a bar to a future action for the conspiracy.

Morey and *H. H. Fuller*, in support of the verdict, said it was immaterial whether a conspiracy were alleged or not, if overt acts were set out and proved, by which the plaintiffs were injured. *Skinner* v. *Gunton*, 1 Wms's Saund. 228, and note 4. The acts of one of the defendants done in pursuance of an agreement with the others, are the acts of all, and they may be alleged according to their legal effect. In treason and trespass it is well settled, that the act of A done by command or advice of B, may be set forth as the act of B; and the same principle is applicable in many other cases of torts, and also in cases of contract. 1 Chit. Pl. 67, 181, 381; Paley on Princ. and Ag. 231; Com. Dig. *Trespass*, C Starkie on Crim. Pl. (Amer. ed.) 36, 88, 89; *Rex* v. *Stone*, 6 T. R. 527; Fost. Cr. L. 350; *Brucker* v. *Fromont*, 6 T. R. 659; 2 Chit. Pl. 281, note; *Jones* v. *Hart*, 1 Ld. Raym.

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738; *Rex* v. *Johnson*, 7 East, 65; *Harding* v. *Greening*, 1 B. Moore, 477; *Rex* v. *Hunt*, 2 Campb. 583; *Rex* v. *Cope*, 1 Str. 144; *Woodgate* v. *Knatchbull*, 2 T. R. 148; *Gardner* v. *Preston*, 2 Day, 206; *Rex* v. *Brisac et al.*, 4 East, 164; *Young* v. *The King*, 3 T. R. 105, 107; *Patten* v. *Gurney*, 17 Mass. R. 182; *Barker* v. *Braham et al.* 2 W Bl. 866; *Parsons* v. *Lloyd*, ibid. 845; *Robinson's case*, 1 Leach, 45; *The Coalheavers' case*, ibid. 76; *Collins et al.* v. *Commonwealth*, 3 Serg. & Rawle, 220; *Commonwealth* v. *Gillespie*, 7 Serg. & Rawle, 769; *Rex* v. *Salter*, 5 Esp. R 125; 2 Starkie on Evid. 54, 403; 3 id. 1565, 1581, 1582.

36

Parker and *Austin*, in replying, cited 2 Stark. on Evid. 563; 2 East's P. C. 973; *Stewart* v. *Dickens*, Stark. Crim. Pl. 92, note; 3 Stark. on Evid. 1526.

March 26th.

WILDE J. delivered the opinion of the Court. This is an action of the case in the nature of a conspiracy for a cheat practised on the plaintiffs, whereby they have been defrauded of their goods and have wholly lost the same. This is not a formed action of conspiracy, and therefore, although the plaintiffs allege that the defendants contrived and conspired together to commit the injury complained of, yet this averment is matter of aggravation only and need not be proved. The damage sustained by the plaintiffs is the ground of the action, and not the conspiracy. *Skinner* v. *Gunton et al.*, 1 Wms's Saund. 230, note 4.

It must be admitted therefore, that if the evidence offered by the plaintiffs proved only the conspiracy, it was improperly admitted, and the verdict must be set aside.

It was proved that the false declarations and pretences were made by Herschell, one of the defendants, the other two defendants not being present, but it was also proved, or the evidence tended to prove, that these false declarations and pretences were made by Herschell in pursuance of a previous combination and conspiracy to that effect, had between all the defendants. And the jury were instructed to find for Myers and Joseph, unless they were satisfied that these false declarations and pretences were made by Herschell in pursuance of such previous combination. Under these instructions the verdict of the jury establishes the fact, that Herschell's declara-

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tions and acts were made and done by the procurement of the other two defendants.

This evidence the defendant's counsel contend is not sufficient to sustain the action, and that the charge of the judge was incorrect. The case is likened to that of perjury, in which it is admitted the words of one cannot be applied to another, so as to authorize the conviction of two or more culprits on a joint charge. But it is easy to distinguish between the cases. Perjury and subornation of perjury are distinct crimes, and must be distinctly charged, and the same rule applies to principals and accessaries. But the case at bar more resembles an action of trespass, as to which the law is well settled. If A command or request B to take the goods of C, and B do it, trespass lies as well against A as against B. For in trespass there can be no accessary. 6 Bac. Abr. 589, *Tresp. G*, 1.[1] So generally, if A does an act at the command or request of B, it is the act of B, and may be so alleged in pleading, according to the well established rule, that every act may and should be alleged according to the legal effect. 2 Stark. Evid. 54, 403; 3 Stark. Evid. 1565, 1581, 1582; *Johnson* v. *Carter*, 16 Mass. R. 443; *Rex* v. *Stone*, 6 T. R. 527; *Brucker* v. *Fromont*, ibid. 659.[2] According to this rule of law the acts and declarations of Herschell are the acts and declarations of the other defendants also, by whose procurement they were made and done. And the law was so declared in the case of *Young et al.* v. *The King, in Error*, 3 T. R. 98. It is true in that case all the defendants were present when the false declarations were made, but the case did not turn on that fact, nor was it material.

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So in the case of *Gardner* v. *Preston et al.*, 2 Day, 205, it was determined, that the combination between the defendants being established, the acts and declarations of one, in pursuance

[1] *Wilbraham* v. *Snow*, 2 Saund. 47; *Menham* v. *Edmonson*, 1 Bos. & Pul 369; *Rafael* v. *Verelst*, 2 W. Bl. 1055; *Smith* v. *Shaw*, 12 Johns. R. 257; *Van Brunt* v. *Schenck*, 13 Johns. R. 414.

[2] See *Waland* v. *Elkins*, 1 Stark. R. 272; *Silver* v. *Kendrick*, 2 N. Hamp. R. 160; *Henry* v. *Henry*, 1 Chipman, 265; *Hastings* v. *Lovering*, 2 Pick. (2d ed.) 214, and note; *Pease* v. *Morgan*, 7 Johns. R. 468; *Phelps* v. *Riley* 3 Connect. R. 266.

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of the combination, were to be considered as the acts and declarations of all. And this is a well settled rule of law in all cases of conspiracy,[3] and the rule is as applicable to this case as it is to an action of conspiracy.[4]

We are of opinion therefore, that the evidence offered by the plaintiffs was properly admitted, and that the instructions o the jury were correct.

But the defendants' counsel object to the form of action, on the ground that it is not conclusive as to the merits. A judgment in favor of the defendants, it is said, cannot be pleaded in bar of an action of conspiracy. If this were true, it would be no valid objection to the plaintiffs' recovery. And if they recover, they cannot afterwards maintain an action for the conspiracy. No civil action lies for a mere conspiracy.[5] There is however no doubt that a judgment for the 38 defendants in this action might be pleaded in bar to any new action that could be framed for the plaintiffs. A judgment rendered on the merits is conclusive upon both parties.[1] But

[3] Roscoe's Crim. Ev. 60 to 64, 325; 2 M'Nally's Ev. 611; *Rex* v. *Stone*, cited in 2 Stark. Ev. (Metcalf's edit.) 403; *Rex* v. *Watson*, 2 Stark. R. 140, 141; *Ex parte Bollman and Swartwout*, 4 Cranch, 75; *Moore* v. *Tracy*, 7 Wendell, 229; 1 Burr's Trial, 21; 2 id. 401; *Queen's case*, 2 Brod. & Bingh. 310; East's P. C. 97; *Commonwealth* v. *Crowninshield*, 10 Pick. 497; *American Fur Co.* v. *The United States*, 2 Peters, 364; *Snyder* v. *Laframboise*, 1 Breese, 269; *Commonwealth* v. *Eberle*, 3 Serg. & Rawle, 9; *Martin* v. *Commonwealth*, 2 Leigh, 745; *Gardiner* v. *Preston*, 2 Day, 205; *Collins* v. *Commonwealth*, 3 Serg. & Rawle, 220; *Hunt's case*, 3 Barn. & Ald. 513; *Clayton* v. *Anthony*, 6 Randolph, 285.

[4] *Moore* v. *Tracy*, 7 Wendell, 229; *Addington* v. *Allen*, 11 Wendell, 374; *Adams* v. *Paige*, 7 Pick. 542; *Wilbur* v. *Strickland*, 1 Rawle, 458; *Reitenbach* v. *Reitenbach*, 1 Rawle, 362.

[5] *Morgan* v. *Bliss*, 2 Mass. R. 112.

[1] See *Standish* v. *Parker*, 2 Pick. (2d ed.) 22, notes 1, 2, 3; *Adams* v. *Peasson*, 7 Pick. 341; *Whitcomb* v. *Williams*, 4 Pick. 228; *New England Bank* v. *Lewis*, 8 Pick. 113; *Saxton* v. *Chamberlain*, 6 Pick. 422; *Briggs* v. *Richmond*, 10 Pick. 391; *Minor* v. *Walter*, 17 Mass. R 237; *Hodges* v. *Hodges*, 9 Mass. R. 320; *Rowe* v. *Smith*, 16 Mass. R. 306; *Loring* v. *Mansfield*, 17 Mass. R. 394; *Thatcher* v. *Gammon*, 12 Mass. R. 268; *Thorpe* v. *Cooper*, 5 Bingh. 129; *Ravee* v. *Farmer*, 4 T. R. 146; *Bagot* v. *Williams*, 3 Barn. & Cressw. 235; *Le Guen* v. *Gouverneur*, 1 Johns. Cas. 436; *White* v. *Ward*, 9 Johns. R. 232; *Grant* v. *Button*, 14 Johns. R. 377; *Canfield* v. *Monger*, 12 Johns. R. 347; *Wheeler* v. *Van Houten*, 12 Johns. R. 311; *Homer* v. *Fish*, 1 Pick. 435; *Offutt* v. *Offutt*, 2 Harr. & Gill, 178; *Young* v. *Black*, 7 Cranch, 565; *Vooght* v. *Winch*, 2 Barn. & Ald. 662.

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if the plaintiff misconceives his action, or the declaration is defective, and he fails in his suit by reason of such defect or misconception, he may sustain a new action. 5 Bac. Abr. 440, *Pleas and Plead. I*, 13; *Hitchin* v. *Campbell*, 2 W. Bl. 779; *S. C.* 3 Wils. 240.[2] In this case all the material facts are alleged in the declaration, and the trial was on the merits. It was not necessary to allege a conspiracy, and a writ of conspiracy, properly so called, cannot be sustained in a case like this That writ, at the common law, was confined to conspiracies to indict the party either of treason or felony. 1 Wms's Saund. 230, note 4; F. N. B. 114; *Savill* v. *Roberts*, Carth. 417. But without relying on this technical objection, it is very clear that a judgment in this action on the merits is conclusive on the parties, and is a bar to any new action.

We pass over the objections to the filing of the new counts, since, for the reasons already given, the other counts are sufficient.

Judgment according to the verdict.[3]

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[2] *Morgan* v. *Bliss*, 2 Mass. R. 112; *Bridge* v. *Sumner*, 1 Pick. 371; *Knox* v. *Waldoborough*, 5 Greenl. 185; *Hull* v. *Blake*, 13 Mass. R. 153; *Standish* v. *Parker*, 2 Pick. (2d ed.) 22, and notes; *Parker* v. *Standish*, *post*, 288; *Spooner* v. *Davis*, 7 Pick. 147.

[3] The principle that fraud accompanied with damage is a good cause of action, is now well settled, both in the English and American jurisprudence. *Bailey* v. *Merrell*, 3 Bulstr. 95; *S. C.* Cro. Jac. 386; Com. Dig. *Action on the Case for a Deceipt*, *A*, 1: *Pasley* v. *Freeman*, 3 T. R. 56; *Ward* v. *Center*, 3 Johns. R. 271; *Upton* v. *Vail*, 6 Johns. R. 181; *Young* v. *Covell*, 8 Johns. R. 23; *Russell* v. *Clark*, 7 Cranch, 92; *Gallager* v. *Brunel*, 6 Cowen, 346, *Allen* v. *Addington*, 7 Wendell, 9; *Moore* v. *Tracy*, 7 Wendell, 229; *Addington* v. *Allen*, 11 Wendell, 374; *Adams* v. *Paige*, 7 Pick. 542; *Pierce* v. *Jackson*, 6 Mass. R. 242; *Whittier* v. *Smith*, 11 Mass. R. 211. *Aliter*, where no actual damage has been occasioned. *Morgan* v. *Bliss*, 2 Mass. R. 112. But where there has been damage, it is not necessary to prove any *moral* fraud on the part of the defendants. *Adams* v. *Paige*, *supra*; *Bird* v. *Randall*, 3 Burr. 1353; 3 Bl. Com. 122; *Foster* v. *Charles*, 7 Bingh. 105; *S. C.* 6 Bingh. 390; *Tapp* v. *Lee*, 3 Bos. & Pul. 371.

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HENRY CHAPMAN *et al. versus* EPHRAIM SEARLE, Administrator of George Whiting.

The defendant gave to L a bill of parcels of certain goods, and a certificate that he held them for L on storage. The bill was receipted, L having given his negotiable note for the amount. Afterwards L offered to cancel the contract, if the defendant would return the note; to which he agreed. The note was then in a bank, having been discounted for the defendant, but some days afterwards the defendant tendered it to L and requested him to cancel the contract; but L had in the mean time assigned the goods to the plaintiffs, his creditors, informing them however of the conversation relative to cancelling the contract. In *trover* by the assignees it was *held*, that the defendant was estopped to say he never had any such goods; that the property vested in L; that the defendant had no lien for the price of the goods; that the contract was not rescinded, it having been executed; and that there was no resale to the defendant, but at most only a conditional agreement to reconvey, which not being in writing, &c., was void by the statute of frauds.

THIS was an action of *trover* for 300 barrels of beef.

The plaintiffs produced in evidence a bill of parcels to R. C. Ludlow, of 300 barrels of beef, signed by Whiting, 39
with a receipt in full for the amount on the bill, dated the 1st of January, 1822; also a certificate of the same date, stating that 300 barrels of beef were received by Whiting on storage for Ludlow. The payment was made by a promissory note payable to Whiting or order. The plaintiffs produced also one part of an indenture, dated the 30th of June, 1822, by which Ludlow had assigned to the plaintiffs as trustees to his creditors, parties to the indenture, all his goods and effects, and among other things 300 barrels of beef. At the time of executing this instrument Ludlow was insolvent, and the assignment was made *bonâ fide* with a view to an equitable distribution of his effects among his creditors. The note before mentioned was represented among the debts due from him.

The plaintiffs proved also a demand upon the defendant for the beef, and a refusal to deliver it, before the commencement of the suit, the plaintiffs having tendered the sum due for the storage.

Ludlow, being called as a witness by the defendant, testified that he bought the beef and took an obligation for the delivery of it, according to the bill of parcels and certificate

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before mentioned; that on the 8th of June, 1822, he gave an order for the beef to M. Bicker, agent of T. K. Jones & Co., but that a delivery was refused; that Whiting soon after called on him, and the witness then asked him if he would return the note and cancel the contract; to which he assented. The price of beef at that time was lower than at the time when the contract was made. The note was then in the State bank, having been discounted on the indorsement of Whiting, so that the cancelling did not then take place, but the witness understood that the bargain was to be cancelled whenever the note should be brought to him. On the 4th of July the note was tendered to him, and a demand made to give up the contract, but the witness having then made his assignment, his assignees replied that the business was out of his hands. At the time when the assignment was made the witness informed the assignees of the conversation relative to cancelling the contract,
40 and stated also that no beef had been actually delivered, but that he had made the contract through the intervention of a broker. The papers were given by him to the assignees about ten days after the assignment was executed.

One Stickney, called also by the defendant, testified that he saw the note tendered to Ludlow; that Whiting said he had come to exchange according to agreement, and Ludlow replied that it was out of his power; that Whiting then asked him if he had not agreed to keep the papers until he should bring him the note, and Ludlow replied in the affirmative; and that Ludlow further said, that he could not get along with his creditors without doing as he had done. Ludlow had written on the back of Whiting's certificate the words, "under Boylston market." Stickney stated that Whiting had not, to his knowledge, any beef under Boylston market, but that he had considerable quantities in other parts of Boston.

All the foregoing testimony was objected to, as going to contradict the written evidence of the contract; and another objection was made to the testimony of Stickney, that it related to conversations after the execution of the indenture.

It being a mere question of law upon the above facts, whether the contract was rescinded, and whether the plaintiffs

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could recover upon any ground, the parties agreed to take the case from the jury and to be nonsuited or defaulted, according as the opinion of the Court should be upon the foregoing questions.

D. A. Simmons for the defendant. The contract of the 1st of January was a mere paper transaction. The bill of parcels and certificate must be taken together, and they amount only to an agreement to deliver beef. There was no delivery, actual or constructive. Brown's Law of Sale, 390 to 394, 446; 1 Bell's Comm. on Law of Scotland, *bk.* 2, *c.* 5, § 2. *no.* 127; Lawes on Charter-Parties, 492. *March* 18th.

Before the assignment, Ludlow had given an order to Bicker, who had demanded the beef and been refused. Ludlow had then only a right of action, which was not assignable at law. The action therefore should have been brought in the name of Ludlow, and in that case Whiting might have sued the note given by Ludlow and have set off the judgment. 4

Before the assignment was made, the contract to deliver was rescinded. *Johnson* v. *Reed*, 9 Mass. R. 84; *Ward* v *Winship*, 12 Mass. R. 481; Brown's Law of Sale, 403.

The subject of the contract was described as beef under the Boylston market, but there was no beef there, so that it is impossible to say that the description applies to the beef for which this action is brought. Trover will lie only for a specific article, and the action should have been founded upon the promise. *Austin* v. *Craven*, 4 Taunt. 644.

Ludlow having failed, Whiting had a lien for the price of the beef.

Cooke for the plaintiffs. The contract of the 1st of January was free from ambiguity, and the parol evidence was inadmissible. *Hunt* v. *Adams*, 7 Mass. R. 518; *Jackson* v. *Sill*, 11 Johns. R. 201; *Stackpole* v. *Arnold*, 11 Mass. R. 33. By that contract the property vested in Ludlow, so that he might maintain trover. Whiting admitted that he held 300 barrels of beef at a stipulated storage, and that he would deliver them to Ludlow on demand. There was an executed delivery; though trover will lie even when it is only constructive; and the article was sufficiently designated to support an action of trover. 2 Powell on Contr. 63; *Bach* v. *Owen*.

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5 T. R. 409; *Mather* v. *Trinity Church*, 3 Serg. & Rawle, 513; *Wilkes* v. *Ferris*, 5 Johns. R. 335; *Chandler* v. *Belden*, 18 Johns. R. 157; *Hurry* v. *Mangles*, 1 Campb. 452: *Elmore* v. *Stone*, 1 Taunt. 457; *Rugg* v. *Minett*, 11 East, 210; *Harman* v. *Anderson*, 2 Campb. 243; *Greaves* v. *Hepke*, 2 Barn. & Ald. 131; *Lucas* v. *Dorrien*, 1 B. Moore, 29, *Phillimore* v. *Barry*, 1 Campb. 513; *Lansing* v. *Turner*, 2 Johns. R. 13; *Stonard* v. *Dunkin*, 2 Campb. 345; *Whitehouse* v. *Frost*, 12 East, 614; *Jackson* v. *Anderson*, 4 Taunt. 24; *Harding* v. *Carter*, 1 Park on Ins. (7th edit.) 4. The refusal of the bailee to deliver the beef upon demand made by Bicker could not prevent it from being assignable, and that demand alone was sufficient to support this action. *Ratcliff* v. *Vance*, 2 So. Car. Rep. 243; *Pattison* v. *Robinson*, 5 Maule & Selw. 105.

42 The contract was not rescinded. If there had been a valid agreement to rescind, the remedy for the defendant would have been an action for the breach of such collateral undertaking; *Dow* v. *Tuttle*, 4 Mass. R. 414; but there was a proposition only, and not a contract to rescind. *Cooke* v *Oxley*, 3 T. R. 653; *Tucker* v. *Woods*, 12 Johns. R. 190. If there was an agreement, it was upon a condition which was not complied with. The returning of the note was a condition precedent. The agreement was unexecuted and was executory in its nature. *Heathcote* v. *Crookshanks*, 2 T. R. 24. It was void by the statute of frauds, not being in writing. *Hasbrouck* v. *Tappen*, 15 Johns. R. 200. It was void too for the want of consideration and mutuality. The note was not in Whiting's control, it having been discounted by the State bank, which might have maintained an action on it against Ludlow, notwithstanding this agreement. *Tucker* v. *Woods*, 12 Johns. R. 190. But however the agreement might have stood as between Whiting and Ludlow, it cannot affect third parties whose rights have intervened. *Smith* v. *Field*, 5 T. R. 402; *Barnes* v. *Freeland*, 6 T. R. 80.

There was no pretence for a lien before Ludlow's failure, and there could be none after.

Simmons, in reply, said that the statute of frauds does not apply to the rescinding of contracts. Phillipps on Evid. 444.

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The assignees having knowledge of all the circumstances, they could take the property only to set it off against the note. The agreement to rescind was valid. It was founded on a sufficient consideration, it being mutually beneficial, and it was unconditional.

PUTNAM J. delivered the opinion of the Court. By the bill of parcels which the plaintiff produces, it appears that Ludlow purchased the goods of Whiting, and Whiting by his certificate acknowledges that he has the same on storage for Ludlow. These papers, unexplained and unimpeached, would leave no question but that the property was in Ludlow, and by his assignment it would pass to the plaintiffs upon the trusts therein contained. *March 26th*

The defendant has offered to prove that the papers do not exhibit the real transaction; that it was merely a paper arrangement; that no goods were sold and delivered, or held by Whiting on storage for Ludlow; and he would draw the inference, that therefore Ludlow could not sell and transfer what he never had in possession either actually or constructively The great question is, whether such parol testimony is admissible. 43

We have been referred to *Austin* v. *Craven et al.*, 4 Taunt. 644, by the counsel for the defendant, and it is the strongest case we have seen on that side. The defendants had made a contract with one K, to sell him 200 hogsheads of sugar; K assigned the contract to the plaintiff, who inquired of the defendants if they had 50 hogsheads of sugar belonging to K, which they would deliver to the plaintiff, and they said they had, and thereupon the plaintiff paid K for the sugar; and it was held, that the plaintiff could not recover in trover, because the 50 hogsheads of sugar were not *in esse*.

This case at first view seems very like the case at bar, but upon more examination there will appear to be a great difference. In the case cited there was only a contract to sell, and not an actual sale of the sugar. In the case at bar there was an absolute sale, proved in the usual manner, and an acknowledgment of an executed delivery. It is true that the defendants, in the case cited, told the plaintiff they had the sugar belonging to K, and would deliver it, but that verbal acknowledgment might, as *Gibbs* J. observed, be explained by other

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evidence, referable, it is presumed, to the contract of sale. In the case at bar, Whiting subscribed a writing acknowledging that he had the goods to keep for Ludlow on storage. As between him and Ludlow the writing must be taken to be conclusive evidence of the fact. Whiting was estopped to say that he had not these goods. Thus in *Hurry* v. *Mangles*, 1 Campb. 452, it was held by Lord *Ellenborough*, that if, after goods are sold, they remain in the warehouse of the vendor and he receives warehouse rent for them, the acceptance of the warehouse rent is a complete transfer of the goods to the purchaser; that it is an executed delivery by the seller to the buyer, and the *transitus* is at an end.[1] So in the case
44 at bar, Whiting, after giving Ludlow those papers, had no lien for the price of the goods.

But a case more like that at bar, upon the point now under consideration, is that of *Stonard* v. *Dunkin et al.*, 2 Campb. 344. There the plaintiff advanced £7500 to one Knight, who as collateral security gave an order on the defendants for some malt. They gave a written acknowledgment that they held the malt for the account of the plaintiff, and Lord *Ellenborough* held that the defendants were estopped to say that the malt was not the plaintiff's, after acknowledging that they held it for the account of the plaintiff.

The case of *Harding* v. *Carter*, at the sittings in Guildhall, Easter T. 1781, cited by Park on Ins. (7th ed.) 4, has a strong bearing upon the point of the estoppel. It was trover for two policies of insurance. The defendants were brokers and had written to the plaintiff, that they had got two policies

[1] *Noble* v. *Adams*, 7 Taunt. 59; *Hawes* v. *Watson*, 2 Barn. & Cressw. 540; *Cuming* v. *Brown*, 9 East, 506; *Rowley* v. *Bigelow*, 12 Pick. 307; *Lucas* v. *Dorrien*, 7 Taunt. 278; *S. C.* 1 B. Moore, 29; *Proctor* v. *Jones*, 2 Carr. & Payne, 532; Chitty on Contr. (3d Amer edit.) 115; *Manton* v. *Moore*, 7 T. R. 67; *Stoveld* v. *Hughes*, 14 East, 308; *Hollingsworth* v. *Napier*, 3 Caines's R. 182; *Pleasants* v. *Pendleton*, 6 Randolph, 473; *Bentall* v. *Burn*, 3 Barn. & *Cressw.* 423; *S. C.* 5 Dowl. & Ryl. 284; *Barney* v. *Brown*, 2 Vermont R. 374; *Tarling* v. *Baxter*, 6 Barn. & Cressw. 360; *Fletcher* v. *Howard*, 2 Aiken's (Vermont) R. 115; *Bloxam* v. *Sanders*, 4 Barn. & Cressw. 941 *Smith* v. *Surman*, 9 Barn. & Cressw. 561; *Harris* v. *Smith*, 3 Serg. & Rawle 20; *Chapman* v. *Lathrop*, 6 Cowen, 110; *Barrett* v. *Goddard*, 3 Mason, 107 *Foster* v. *Frampton*, 6 Barn. & Cressw. 107; Poth. De Propriété, *no.* 200 Dig. 41. 1. 9 6.

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effected, one on account of the plaintiff's clothes and wages, and the other on account of the owners, and that Mr. N. was the underwriter. A loss happened, and the defendant produced a policy underwritten by one I. S. upon the ship only, in which the plaintiff had no interest. Lord *Mansfield* held the defendants as the actual insurers. The defence set up was, that the letter was written by the defendants' clerk through mistake, and it was said that trover would not lie for that which never existed; but his Lordship would not suffer the defendants to contradict their own representations.

There the representation was by an authorized agent, but in the case at bar by the party himself. We are satisfied that the parol testimony was not admissible. It was in direct contradiction to the writing, which Whiting could not be admitted to deny.[1]

It was contended on the part of the defendant, that the contract was rescinded by the original parties before the plaintiff's title accrued. If our view of the case is correct, the contract was executed, and was not merely executory, and so it could not be considered as rescinded; which must be understood as a discharging or cancelling of it while it remained to be performed.[2]

The case, stripped of the parol testimony, proves a sale 45
and delivery by Whiting to Ludlow, an assignment by Ludlow to the plaintiffs, and a demand of the property of the defendant, who represents Whiting, with a tender of the price of the storage.

It has been contended however, that Ludlow paid for the

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[1] As to the operation, by way of estoppel, of admissions and representations by parties, see *Russell* v. *De Grand*, 15 Mass. R. 35; *Hemmenway* v. *Bradford*, 14 Mass. R. 121; *Jewett* v. *Torrey*, 11 Mass. R. 219; *East India Co.* v. *Atkins*, Com. 346; *S. C.* 1 Str. 168; *South Sea Co.* v. *Bumstead*, 1 Eq. Ca. Abr. 76; *Stow* v. *Wyse*, 7 Connect. R. 214.

By agents, see 2 Stark. Ev. 57, 58; *Biggs* v. *Lawrence*, 3 T. R. 454; *Fairlie* v. *Hastings*, 10 Ves. 123; *Kahl* v. *Jansen*, 4 Taunt. 565; *Bentham* v. *Benson*, Gow, 45; *Langhorn* v. *Allnutt*. 4 Taunt. 511.

[2] *Perrine* v. *Cheeseman*, 6 Halst. 174; *Buel* v. *Miller*, 4 N. Hamp. R. 196; *Smith* v *Haynes*, 9 Greenl. 128; *Munroe* v. *Perkins*, 9 Pick. 298; *Lattimore* v. *Harsen*, 14 Johns. R. 330; *Dearborn* v. *Cross*, 7 Cowen, 48; *Fleming* v. *Gilbert*, 3 Johns. R. 528; *Keating* v. *Price*, 1 Johns. Cas. 22; *Erwin* v. *Saunders*, 1 Cowen, 250; *Le Fevre* v. *Le Fevre*, 4 Serg. & Rawle, 241

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property by his note, which is still due, and that the defendant should be permitted to retain until the note shall be paid. The reasoning before stated, if correct, is an answer to that argument. The *transitus* was at an end.[1] Whiting had no other lien but for the storage, and that has been tendered.

Finally, it has been contended for the defendant, that there was a re-sale of the property by Ludlow to Whiting before the plaintiffs' title accrued. But upon a careful review of the evidence, we can perceive only an agreement to reconvey at some future time, and upon certain conditions, which were never complied with before Ludlow was obliged to assign all his property to the plaintiffs. The original parties were willing to have the note given up and the contract of sale cancelled; but when that agreement was made, on the 8th of June or soon after, the note was in the bank, having been placed there by Whiting, and the assignment was made to the plaintiffs before the 4th of July, when Whiting brought the note and offered to give it up to Ludlow. It was then too late; the necessities of Ludlow had compelled him to transfer all his property to the plaintiffs for the use of his creditors, and this property had not been divested from him. The original parties might have adopted a different mode. Ludlow might have re-sold the goods to Whiting unconditionally, taking an indemnity from him against the note; and the property would have vested in Whiting, in virtue of the agreement, without any re-delivery, the goods being already in his possession. Such is the provision of the civil law. "*Interdum*

[1] As there was nothing in the case to rebut the presumption of an absolute payment by the negotiable promissory note given by Ludlow, the doctrine of *transitus* seems inapplicable to the case, even supposing the beef to have been in a situation in which without such payment the right of stoppage would have continued. *Whitcomb* v. *Williams*, 4 Pick. 229; *Van Cleef* v. *Therasson*, *ante*, 14, note 3. See *Reed* v. *Upton*, 10 Pick. 522. In this last case a promissory note was given for the property purchased, but in the contract of sale it was stipulated, that the money should be paid on the delivery of the property, and this was held to be sufficient to rebut the presumption of absolute payment by the note. Our courts seem disinclined to take advantage of the doctrine they have established, touching the presumption of an absolute payment from the taking of a negotiable promissory note, and perhaps it may be found inconvenient to extend the doctrine beyond the cases to which it has already been applied.

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tuam sine traditione nuda voluntas domini sufficit ad rem transferendam; veluti si rem, quam tibi aliquis commodaverit, aut locaverit, aut apud te deposuerit, postea aut vendiderit tibi, *aut donaverit, aut dotis nomine dederit. Quamvis enim ex ea causa tibi eam non tradiderit, eo tamen ipso, quod patitur tuam esse*, statim tibi acquiritur proprietas, perinde ac si eo nomine 46
tibi tradita fuisset." Just. Inst. *lib.* 2, *tit.* 1, § 43. But that was not done. There was at most only an agreement to reconvey the property when the note should be delivered up. And that agreement was void by the statute of frauds. When it was made, Ludlow was the owner, and Whiting was the purchaser; the value was more than £10; nothing was given or received with intent to bind the bargain, or on account of the goods to be sold, and there was no note or memorandum in writing concerning the contract. So that the property legally remained in Ludlow when he assigned all his effects to the plaintiffs.

There is no objection to the form of the action, which, by *St.* 1822, *c.* 90, may be maintained against an administrator.

The defendant must therefore be defaulted, and the judgment is to be for the plaintiffs.

William S. Ellery *versus* The Merchants' Insurance Company.

By the terms of a policy of insurance the underwriters were not to be liable for a partial loss on grain, &c., unless the damage should happen by stranding or bilging. In a hurricane the ship was thrown on her beam ends and in consequence of excessive straining her seams opened, whereby a great quantity of water was let into the ship, but no fracture was made in her bottom. *Held*, that this was not a bilging, within the meaning of the policy.

Whether what constitutes a bilging be a question of law or of fact, *quære*.

This was an action of assumpsit on a policy of insurance, underwritten by the defendants, on property on board the ship Panther. One question in the case was, whether the damage done to the property was occasioned by the ship's *bilging*, so as to make the defendants liable for a particular average, within the meaning of the following clause in the

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printed part of the policy, viz. "And it is further agreed between the parties, that the assurers are not liable for any partial loss on salt, grain, hemp, flax, fish, fruit, hides, skins, or other goods that are esteemed perishable in their own nature, but the owners of such shall recover on a general average, and on a particular average when the damage happens by stranding or bilging, provided such damage amount to seven per cent."

In some depositions used at the trial it was stated, that the ship, laden with a cargo of wheat, hides, and tallow, encountered a tremendous hurricane, which threw her on her beam ends, by which she strained excessively in the larboard waist and bilge, lost her main and mizen masts, fore-topmast, and rudder, and with the water admitted into the ship by thus straining and also down the mast-coats and companion way, the after part of which was stove in, she righted with six and a half feet water in the hold, having remained about ten minutes on her beam ends. The cargo was greatly shifted and damaged on the larboard side. After the ship righted, the spars got under her bottom, so that they could not be cleared away for several hours, and thumped under her stern, so as to take off a number of sheets of copper, and one plank in the counter was almost stove through by the spars striking against it, whereby a considerable quantity of water was let into the vessel; and the bilge and water-way seams were opened by the straining of the ship, whereby a great quantity of water was let in. The ship leaked but little after the wreck of the spars was cleared away.

March 16th.

T. Welsh, for the plaintiff, contended that any accidental injury to the bottom of a ship from the perils of the sea, by which water is let in, is a bilging. The intention of the policy in enumerating certain perishable articles, was to draw a distinction between damage arising from the nature of the articles and sea damage. For the meaning of the word *bilge* he referred to the Dictionaries of Skinner, Bailey, Kenrick, Sheridan, Johnson, and others, to the Cyclopædias of Rees and Nicholson, and to the case of *Peele* v. *Merchants' Insurance Company*, recently determined in the Circuit Court of the United States before Mr. Justice *Story*. [3 Mason, 39.] He cited also *Burnett* v. *Kensington*, 7 T. R. 210.

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Prescott and *F. Dexter*, *contrd*, referred to the same Cyclopædias and to the Encyclopædia Britannica, the Glossary in Bowditch's Practical Navigator, *p.* 235, Falconer's Marine Dictionary, and the case of *Burnett* v. *Kensington*, to show that a ship is not bilged, unless the bottom is broken or a plank started, so as to give a free passage for the water, and not merely to admit a leakage.

March 26th

PARKER C. J., in giving the opinion of the Court, said they were not satisfied whether it was most proper for the Court or for the jury to determine what constitutes a bilging. The question has however, in the present case, been referred to us to decide. Several Dictionaries have been cited, the authors of which had, some of them better, and others no better means of information on the subject, than we ourselves; but we think it is to be gathered from them, that to constitute a bilging there must be a breach in the vessel, though they may differ as to the particular place which must be fractured. One of the planks of this ship is stated to have been worn almost through, but there is no evidence of an actual breach. The vessel was very much strained, and her seams opened and let in water, and water came down the mast-coats and companion way, whereby the cargo was injured, but the defendants did not undertake to indemnify the plaintiff for a partial loss happening from these causes.

We all think that there was no technical bilging proved, and that the defendants are not liable for a particular average.[1]

[1] See 2 Phil. Ins. c 18, note 4; Stevens and Benecke on Average, by Phillips, 424, note (e).

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JOSHUA LORING, in Equity, *versus* ENOCH COOKE.

Where a right in equity of redeeming mortgaged real estate is sold on execution to a creditor of the mortgager, the mortgager is entitled to redeem such right in equity upon repayment of the purchase money and interest, without paying other demands of the purchaser against him.

A tender of the purchase money must be unconditional; and where the mortgager offered the money, but insisted on the purchaser's executing a release of the right in equity, which he refused to do, the tender was held insufficient.[2]

THE bill alleged that L. Baldwin, a deputy sheriff, by virtue of an execution in favor of Lodge & Draper, against
49 Loring, sold on the 14th of April, 1821, for 1200 dollars, Loring's right in equity of redeeming certain mortgaged real estate, and that Cooke was the purchaser; that Cooke, never having paid off the mortgage, took possession of the premises and had ever since occupied them; that on the 13th of April, 1822, Loring tendered to him 1275 dollars and demanded a release or conveyance of the right in equity, and that he refused to receive the money and give such release or conveyance; and that Loring tendered to him for his signature a deed of release, which he refused to execute.

The answer admitted that Loring did bring a bag of money to Cooke and propose to pay him 1275 dollars if he would first execute and deliver a deed of reconveyance, and did offer a deed for his signature, but it denied that Loring ever offered to pay that sum without any conditions.

The answer further stated, that Loring owed Cooke other sums of money, that Loring was insolvent, and that Cooke purchased the equity of redemption for no other purpose than to obtain satisfaction of some part of those debts; and it submitted, that the Court would not decree a reconveyance until the plaintiff should tender and pay the balance due to the defendant.

March 3d. *S. D. Parker*, for the plaintiff, said the tender was suffi-

[2] See Revised Stat. *c.* 73, § 42. The purchaser of the right to redeem, or the person holding under him, is now required, upon payment of the purchase money, &c., to execute, acknowledge and deliver to the debtor a sufficient deed of release of the right of redemption taken and sold. Id. It would seem, that a tender of the purchase money, &c., as required by the statute, accompanied by a demand of a release, would now be proper. Per *Parker* C. J., in *Saunders* v. *Frost*, 5 Pick. 270.

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cient. The statute provision for redemption was for the benefit of the debtor. If the purchaser takes the money and refuses to convey and becomes insolvent, the statute is rendered nugatory. There must be a simultaneous tender and conveyance. This case differs from that of a payment of a common debt, where the creditor is not bound to give a receipt and the payment may be proved by other evidence. Here there is no obligation on the part of the debtor to redeem, and an equity of redemption cannot pass by parol, but only by deed. *Scott* v. *M'Farland*, 13 Mass. R. 311. Loring could not be compelled to run the risk of losing his money without receiving a deed. *Newcomb* v. *Brackett*, 16 Mass. R. 161.

To the point, that the plaintiff was entitled to redeem upon the repayment of the purchase money and interest, without paying other debts due to the purchaser, were cited *Hicks* v. *Bingham*, 11 Mass. R. 300; *Pomeroy* v. *Winship*, 12 Mass. R. 517; *Bigelow* v. *Willson*, 1 Pick. 492. 50

Orne, for the defendant, cited, on the question of the sufficiency of the tender, *Thayer* v. *Brackett*, 12 Mass. R. 450; *St.* 1815, *c.* 137; *St.* 1798, *c.* 77; *Clark* v. *Tyson*, 1 Str. 504; *Thomas* v. *Evans*, 10 East, 101; *Lancashire* v. *Killingworth*, 2 Salk. 623, and 3 Salk. 341.

In regard to the other question, he contended that the statute of 1815, in saying that the equity of redemption may be redeemed upon payment of such sum as may by the sale have been satisfied on the execution, with interest, intended only to fix the amount which should be due on the particular contract by which the equity of redemption was purchased, without meaning to interfere with any lien which the purchaser might thereby acquire in relation to other demands against the debtor. In England the court of equity holds, that land mortgaged is bound, not only for the sum specifically secured by the mortgage, but likewise for other sums due to the mortgagee; and in this Court the plaintiff, who is seeking equity, will be compelled to do equity by paying all the defendant's just demands against him, before the Court will decree a reconveyance. Poth. Oblig. *no.* 503; Com. Dig. *Chancery*, 4 *A*, 10; 2 Ch. Ca. 87; *Demainbray* v. *Metcalf*, 2 Vern. 691; *Rayson* v. *Sacheverel*, 1 Vern. 41; 8 Mass. R. 556.

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WILDE J. delivered the opinion of the Court. There is but one question in this case which requires a moment's consideration; and that depends on the sufficiency of the tender; for it is very clear that the plaintiff is entitled to redeem on the repayment of the purchase money and the interest.[1] This right is expressly given by statute, and cannot be charged with other independent demands, according to the doctrine of tacking as adopted by the English courts of equity.

The objection made to the tender is, that it was not absolute, but conditional. The plaintiff insisted on the defendant's executing a release of the equity, and on his refusal so to do the
51 tender was withdrawn. The plaintiff's counsel now contends, that the defendant was bound to execute the release, and that the tender was good. But it is an error to suppose that the defendant was under any legal obligation to execute the release. We know of no such obligation; the statute imposes none, but requires an unconditional payment of the money, in order to redeem an equity sold on execution. If after this the estate is withheld by the purchaser, the remedy is by application to a court of equity.

In the case of *Glasscott* v. *Day*, 5 Esp. R. 48, it was determined by Lord *Ellenborough*, that money tendered with a demand of a receipt in full, and refused on that ground, was not a legal tender. And the same point was determined in the case of *Thayer* v. *Brackett*, 12 Mass. R. 450. There is nothing to distinguish those cases from the present. It makes no difference, that the plaintiff was not under any legal obligation to redeem; for if he elects to redeem, he must comply with the requisitions of the statute. If he relies on his tender, it must be a legal tender, and such a one as would be good in case he was bound to pay a debt or to perform a duty. He cannot impose conditions, or if he does, he will lose the benefit of his tender. The defendant did not refuse to receive the money, he only refused to execute a release. There was therefore neither a tender, nor a refusal of the money, there was

[1] See *Dorsey* v. *Gassaway*, 2 Harr. & Johns. 412; *Gwinne* v. *Whitaker* 1 Harr. & Johns. 465; *Peabody* v. *Patten*, 2 Pick. (2d ed.) 520 n. 1; *Legro* v. *Lord*, 1 Fairfield, 161

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only a conditional offer to pay; and it is impossible to hold that this amounts to a legal tender.[1]

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Bill dismissed.

THOMAS SOMES, Administrator of Nehemiah Somes, *versus* JOHN SKINNER. 52

A grants land to B in fee with warranty, and then mortgages the same land to C, who has no notice of the former conveyance, and whose deed is recorded before B's. After B's deed is recorded, C assigns the mortgage to the demandant, who releases to A and at the same time takes back from him a new mortgage with warranty. B dies, leaving A and the tenant his heirs, having been in possession during the time of all these conveyances. *Held*, that the release to A did not give him an instantaneous seisin so as to enable him to reconvey an estate, but that it operated by estoppel a discharge of the first mortgage, leaving B an unincumbered fee; but that when the land came to A and the tenant by descent, the demandant took A's moiety by estoppel by virtue of the second mortgage.

A deed creating an estoppel to a party who undertakes to convey by it land in which he has nothing at the time, but to which he afterwards acquires a title by descent or purchase, passes an interest and a title from the moment such estate comes to the grantor, not only against the grantor and those claiming under him, but also against strangers who come in after the estoppel.

Where the demandant in a writ of entry makes out his title to a part only of the land demanded, he shall have judgment for that part.[1]

Where a mortgagee recovered in a writ of entry against a stranger, the judgment rendered was conditional. See *St.* 1785, *c.* 22, § 1.

THIS was a writ of *entry sur disseisin*, in which the administrator of Nehemiah Somes demanded of John Skinner seisin of a tenement in Boston, counting upon the seisin of William S. Skinner on the 8th of January, 1811, and a conveyance by him on that day to the intestate in fee and in mortgage, and alleging a disseisin done by the tenant to the intestate. The tenant pleaded *non disseisivit*, and on that plea issue was joined.

To prove the seisin of the intestate the demandant produced a deed of mortgage from W. S. S. to the intestate, dated

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[1] See *Saunders* v. *Frost*, 5 Pick. 269, 270; *Robinson* v *Batchelder*, 4 N. Hamp. R. 40; *Laing* v. *Meader*, 1 Carr. & Payne, 257; *Ryder* v. *Townsend*, 7 Dowl. & Ryl. 119; *Griffith* v. *Hodges*, 1 Carr. & Payne, 419; *Cheminant* v. *Thornton*, 2 Carr. & Payne, 50; *Strong* v. *Harvey*, 3 Bingh. 304, *S. C.* 11 B. Moore, 72; *Mitchell* v. *King*, 6 Carr. & Payne, 237; *Peacock* v. *Dickerson*, 2 Carr. & Payne, 51; *Legro* v. *Lord*, 1 Fairfield, 161.

[1] Confirmed by Revised Stat. *c.* 101, § 11.

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the 8th of January, 1811, and recorded in September, 1812, conditioned for the payment of 4000 dollars; which condition had never been performed.

In defence the tenant produced a deed from his father, John Skinner, to W. S. S. in fee simple with warranty, dated in December, 1804, and recorded in April, 1805. Also a deed from W. S. S. to the same J. S., dated in March, 1805, and recorded in March, 1807. Also a deed of mortgage from W. S. S to Stephen Codman, (who had no notice of the deed
53 last mentioned,) dated the 1st of July, 1805, and recorded on the 10th of the same month, to secure the sum of 4000 dollars, payable in three years from December 1804, with interest annually.

On the 8th of January, 1811, Codman, for the consideration of one dollar, made a deed of release and quitclaim to the intestate, "meaning thereby to assign all his right under the mortgage and possession taken under the same," and delivered over to him the deed of mortgage; and on the same day the intestate, for the consideration of one dollar, executed and delivered a deed of release and quitclaim to W. S. S. and took from him the deed of mortgage first mentioned.

J. S. the father lived on the premises during all the conveyances, and until his death in 1813; after which his son the tenant moved on. J. S. the father left three sons, John the tenant, William S. before mentioned, and Richard who died unmarried and without issue in August, 1817.

The tenant contended, that in consequence of the quitclaim from the intestate to W. S. S., his father became seised by virtue of the deed to him of March, 1805.

The demandant contended, that the assignment from Codman to the intestate, the quitclaim from the intestate to W. S. S. and the mortgage from W. S. S. to the intestate, were all one transaction for the purpose of more conveniently securing the money lent by the intestate, and that in law the title was perfect in the intestate; but that if this were not so, still the demandant was entitled to a moiety of the premises by reason of its having descended from J. S. the father to W. S. S.

A verdict was taken by consent for the demandant, which was to be confirmed in the whole, or to be altered so as to stand for

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an undivided moiety, or to be set aside and the demandant to be nonsuited, according as the Court should determine the law.

The case was twice argued, first at March term 1823, and again at March term 1824.

March 5th, 1823, and July 6th, 1824.

Prescott and ***G. Sullivan*** for the demandant. As the mortgage to Codman was made before the deed to J. S. was recorded, Codman acquired a title, and his deed of release to the intestate must be construed to operate as a grant, it appearing by the recital in the deed, that Codman had taken possession for condition broken. *Pray* v. *Pierce*, 7 Mass. R. 381. The legal estate passed from Codman to the intestate and from him to W. S. S. and back to the intestate as mortgagee. [*Parker* C. J. Could the mortgager be the assignee of the mortgage? Would not the effect of the release to W. S. S. rather be to discharge the mortgage and restore efficacy to his deed to J. S.?] If W. S. S. had held the right in equity to redeem, that would have been the operation, but he had ceased to have any interest in the land. He was indeed liable on his covenants, but he could take a grant like any stranger.

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The three deeds of the 8th of January, 1811, are to be considered as one conveyance. *Holbrook* v. *Finney*, 4 Mass. R. 566; *King* v. *King*, 7 Mass. R. 499. W. S. S. had but an instantaneous seisin, and the intestate continued to have all the title which had been in Codman. There is no evidence that the debt secured by the first mortgage has been paid. W. S. S. takes up one specialty and gives another, but this is no payment, and a court of equity would not thereupon decree a redemption of a mortgage.

The demandant is at least entitled to recover the moiety which has descended to W. S. S. The recording of the deed to the intestate is equivalent to livery of seisin; *Pidge* v. *Tyler*, 4 Mass. R. 545; *Marshall* v. *Fiske*, 6 Mass. R. 30; *Pray* v. *Pierce*, 7 Mass. R. 382; and the deed also contains a warranty; so that if the action were against W. S. S. or one claiming under him, it would not be denied that he was estopped to controvert the demandant's title. But an estoppel which works an interest in land runs with the land, and when the estate comes to the grantor the livery of seisin shall operate according to the right and enable the grantee to maintain his action against

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a mere stranger. Co. Lit. 47 *b*, and note 307; ibid. 352 *b*, note 307; Com. Dig. *Estoppel*, *B*; *Rawlyns' Case*, 4 Co. 53; *Palmer* v. *Ekins*, 2 Ld. Raym. 1551; *Trevivan* v. *Lawrence*, 6 Mod. 258; *S. C.* 1 Salk. 276; *Edwards* v. *Omellhallum*, March, 64, *pl.* 99; Vin. Abr. *Estoppel*, (*A. a*);

55 *Jackson* v. *Matsdorf*, 11 Johns R. 97; *Adams* v. *Frothingham*, 3 Mass. R. 355, 362.

W. Sullivan and *Harrington* for the tenant. The demandant having declared on the seisin of W. S. S. in 1811, he is bound to prove it as alleged. The facts however show that W. S. S. was not seised, but that his father had seisin and possession, actual and legal. The recital in the deed from Codman is not evidence of possession taken by him; and by his release to the intestate, neither of them being in possession and there being no privity between them, nothing passed. Shep. Touch. 321, 329; *Kite and Queinton's Case*, 4 Co. 25; *Blemmerhasset* v. *Humberstone*, Hut. 65; Co. Lit. 193 *b*, 273 *b*; *Quarles* v. *Quarles*, 4 Mass. R. 688; *Porter* v. *Perkins*, 5 Mass. R. 236; *Warren* v. *Childs*, 11 Mass. R. 222; *Mayo* v. *Libby*, 12 Mass. R. 343. Although the word *assign* is used, yet the intention, which is to be gathered from the whole deed, was only to release; otherwise a full consideration would have been expressed in the deed. We have no evidence that the bond was assigned, and it is to be presumed that it was paid; and if the debt is extinguished, the mortgage, which is only an incident to the debt, is extinguished likewise. *Martin* v. *Mowlin*, 2 Burr. 978; *Jackson* v. *Willard*, 4 Johns. R. 41. If the deed from Codman had any effect, it was to discharge the mortgage, for where he to whom a release is made cannot take, it enures by way of extinguishment. Co. Lit. 279, 280; 1 Crui. Dig. 385. If then nothing passed from Codman to the intestate, nothing passed from the intestate to W. S. S. The three deeds of the 8th of January cannot be considered as one conveyance, for the design was not to keep alive the old debt, but to extinguish it and create a new one. The doctrine of estoppel does not apply, for the tenant does not claim under W. S. S. Co. Lit. 352; *Arthur* v. *Bokenham*, 11 Mod. 148; *Jackson* v. *Bull*, 1 Johns. Cas. 90, 91; *Edwards* v. *Rogers*, W. Jones, 460

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PARKER C. J. delivered the opinion of the Court. [After stating the facts.] It appears from the foregoing recital, that on the 1st of July, 1805, Codman became seised in fee and in mortgage of the estate by virtue of the deed to him, the prior deed of W. S. S. to his father not having been registered until after that time, and Codman having no knowledge of the prior deed. But as the deed to J. S. the father was registered afterwards, and before any assignment of the mortgage by Codman, J. S. the father was seised of the equity of redemption of that mortgage. The deed of release and quitclaim of Codman to the intestate made for a valuable consideration, with the delivery over of the mortgage deed, operated as an assignment of the mortgage to him, so that on the execution of that release the intestate became seised of the legal estate, and the equity of redemption was in J. S. the father. Thus no estate whatever remained in W. S. S. and a discharge of the mortgage would vest an indefeasible estate in his father. But the intestate, on the 8th of January, 1811, made his deed of release to W. S. S., and a principal question is, whether any and what estate passed to W. S. S. by virtue of that deed. If, as contended by the counsel for the demandant, it passed the legal estate as a bargain and sale, or as an assignment to him of the mortgage, then his deed made on the same day to the intestate vested the estate in him, and he would be seised so as to support his action. If it amounted only to a discharge of Codman's mortgage, then the effect would be to relieve the title of J. S. the father from an incumbrance and he would be the lawful owner and the only person seised of the estate. We have labored much to come to the conclusion contended for by the demandant's counsel, as the equity of the case is clearly on that side, so far as we can judge from the conveyances, but we find ourselves met at every step by rules of law which our duty will not allow us to neglect. It is impossible to consider the deeds between the intestate and W. S. S. as conveying a momentary seisin to the latter and a restoration of the title to the former in the shape of a mortgage, because the release to W. S. S. conveyed no estate, he not being in possession nor having any title at the time, nor can it be considered as an assignment of the mortgage of Codman to him, for he, being the mortgager and having con-

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veyed the equity of redemption by the legal effect of his deed to his father, could not at the same time stand on the footing of a mortgagee with power to convey to the prejudice of his father; so that the only effect which the release to him could have, was to discharge the mortgage, and then J. S. the father, who held the equity of redemption and was in possession, became the legal owner of the estate, and thus the intestate, by this blundering system of conveyancing, lost the benefit of his mortgage. We see no way of coming to a different conclusion.

But there is another branch of the case attended with equal difficulties. J. S. the father died in 1813; and W. S. S., who mortgaged to the intestate, and J. S. the tenant, together with R. S., who is dead, became his only heirs. The title to a moiety of the premises, R. S. having died without issue and unmarried, thus came to W. S. S., and by virtue of his deed and the operation of law his right in the estate would enure to the intestate by way of estoppel or rebutter, so that if this action were against W. S. S. or his heirs, or any person claiming by or through him, they would be estopped to deny the title of the demandant. J. S. the tenant is a stranger to the deed of his brother, and he is not privy in estate, his title to one moiety of the tenement being independent of him, and the question is, whether he is bound by the estoppel, so that he cannot be allowed to say that nothing passed by the deed of W. S. S. to the intestate, as to the other moiety in which he has no right. On this point we have made considerable research, but without gaining much light. The old books are obscure on the subject and somewhat contradictory. In 2 H. 6, 2, it is said that a stranger cannot say *riens passa per le fait*, but the court was divided; and in 2 H. 4, 21 and 22, it is stated that a stranger shall not plead *non est factum*, but may plead *riens passa per le fait*, and this probably is the law. Certainly this has been the practice with us, for nothing is more common, than, in the trial of real actions or actions of trespass *quare clausum*, for one party to avoid the effect of a deed produced by the other, by showing that the grantor was not seised and so nothing passed by his deed. Whether this is confined to the case of the disseisin of the grantor, or is applicable to other cases of an ineffectual deed, may be doubted, but the party in possession

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against whom a mere quitclaim is produced, may always avoid it by showing that the releasee was not in possession and so took nothing by the deed.[1] In the case of a deed of bargain and sale it would seem that an adverse seisin would be required to defeat its operation, otherwise there seems to be no good reason why a stranger should question its operation. For it would seem to be a strange doctrine, that one who held title by deed, unimpeachable by the grantor, his heirs, or any privies in estate, should not be able to maintain his title against a mere trespasser, or one who has no legal interest in the land; but such is the law, provided a stranger may question his right on the ground that nothing passed by the deed because the grantor at the making of it had nothing in the land.

There are some authorities which look as if this absurdity did not exist, but they are not so explicit as we could wish. Thus it is stated in the marginal note to the case of *Trevivan* v. *Lawrence*, 1 Salk. 276, that where an estoppel works an *interest in the land*, it runs with the land and is a title. The authorities cited, however, do not fully bear out this position, only going to show that all parties, privies, &c., are bound by the estoppel, but in the case itself it is laid down by Lord *Holt*, that where an estoppel works *on the interest of the land* it runs with it into whose hands soever the land shall come, and that *an ejectment is maintainable on a mere estoppel*. Unless this were intended to be restricted to ejectment against those who were parties or privies to the instrument creating the estoppel,

[1] This doctrine has been considerably qualified; so that a deed or other instrument, though in form a mere release or quitclaim, will be so construed and applied as to pass an estate, when such was the intention, even where the releasee is out of possession. *Russell* v. *Coffin*, 8 Pick. 151; *Pray* v. *Pierce*, 7 Mass. R. 381; *Reformed Dutch Church* v. *Veeder*, 4 Wendell, 496; Shep. Touch. 82, 83; *Roe* v. *Tranmer*, 2 Wils. 78; *Croude* v. *Ingraham*, 13 Pick. 35. But see *Warren* v. *Childs*, 11 Mass. R. 225; *Swett* v. *Poor*, 11 Mass. R. 549; *Hamblet* v. *Francis*, 4 Mass. R 78, 79. See also *Porter* v. *Perkins*, 5 Mass. R. 233; *Thatcher* v. *Cobb*, 5 Pick. 425; *Kennebeck Purchase* v. *Call*, 1 Mass. R. 483; *Bennett* v. *Irwin*, 3 Johns. R. 366.

In this State a deed of quitclaim and release, of the form in common use here, is sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale. Revised Stat. *c.* 59, § 5.

A release or quitclaim deed in Connecticut is considered an original conveyance. It is most commonly used however to convey the legal title to one who already has the equitable title. *Dart* v. *Dart*, 7 Connect. R. 250.

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here is authority for the present case, and there is nothing in the case cited suggesting such a qualification. And as Lord *Coke* lays down the principle, that not only parties and privies in estate, but all those who *come in in the post*, are bound by an estoppel, perhaps the above position of Lord *Holt*, that an ejectment may be maintained on an estoppel, is correct and general in its application. Co. Lit. 352 *b*.

And this should seem to be the ground of decision in the following case from 1 Rol. Abr. 868, *Estoppel*, *K*, *pl.* 3. A disseises B of land, and afterwards B suffers a common re-
59 covery in which the precipe is brought against B, and by the record the sheriff puts the recoveror in possession upon a writ of *habere facias seisinam :* then C, a stranger, enters upon A and disseises him, upon which the recoveror enters ; and his entry is lawful, for although B was not a good tenant to the precipe, still this is a good recovery by estoppel against B, his heirs and assigns, it being fee-simple land, and binds all except A, who was seised of the land at the time of the recovery, and therefore by consequence shall estop C, who claims not under A, but comes in, *after the recovery*, by disseisin. The principle of this case, if applied to the case before us, will warrant a decision in favor of the demandant for so much of the land as came to W. S. S. on the death of his father and brother Richard. The intestate had a title against W. S. S. his heirs and assigns by way of estoppel created by deed with warranty ; this title enured or operated upon the land at the moment the descent was cast on W. S. S. The tenant is a stranger to this title, and having entered upon the land claiming the whole and defending it by his plea of *non disseisivit*, he must yield to the intestate, who stands in the place of recoveror in the abovecited case, and the estoppel under which he claims shall bind the tenant, because as to the moiety of W. S. S. the tenant comes in after the estoppel and that by disseisin, because by his plea he defends on a title which he has not.

There are other cases which, though not directly in point seem to recognise the principle involved in these which have been cited. The general doctrine, that an estoppel which works upon real estate is not a mere conclusion but may pass an interest and constitute a title, is discussed at some length in

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the case of *Weale* v. *Lower*, Pollexf. 66. It is there laid down by Lord Chief Justice *Hale*, and the position is sanctioned by all the judges called to his assistance, in regard to a fine, which when it was levied passed no interest because the estate on which it was to operate was contingent, "that the estate upon the happening of the contingency feeds this estoppel, and then the estate by estoppel becometh an estate in interest, and *shall be of the same effect* as if the contingency had happened before the fine levied." The doctrine thus laid down is recognised 60 in 2 Cruise's Dig. 452, *tit.* 16, *Remainder*, *c.* 8, § 19, 20. The same doctrine is maintained in *Smith* v. *Stapleton*, Plowd. 134; *Rawlyns' Case*, 4 Co. 53, 54; Bac. Abr. *Leases*, *O*; Com. Dig. *Estoppel*, *E*, 10; Co. Lit. 47 *b*, n. 307. The general principle to be deduced from all these authorities is, that an instrument which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor.[1]

[1] *Comstock* v. *Smith*, 13 Pick. 116; *Carver* v. *Astor*, 4 Peters, 83 *et seq.*; *Jackson* v. *Hoffman*, 9 Cowen, 271; *Sinclair* v. *Jackson*, 8 Cowen, 586; *Doe* v. *Oliver*, 10 Barn. & Cressw. 181; *Vicks* v. *Edwards*, 3 P. Wms. 372; *Fairbanks* v. *Williamson*, 7 Greenl. 100; *Allen* v. *Sayward*, 5 Greenl. 231; *Doe* v. *Martyn*, 8 Barn. & Cressw. 497; *Fairtitle* v. *Gilbert*, 2 T. R. 171; *Rees* v. *Lloyd*, Wightwick, 123; *Helps* v. *Hereford*, 2 Barn. & Ald. 242; *Denn* v *Cornell*, 3 Johns. Cas. 174; *Penrose* v. *Griffith*, 4 Binn. 231; *Garwood* v. *Dennis*, 4 Binn. 314; Fearne, (edit. 1820,) 365, *c.* 6, § 5; *Blight* v. *Rochester*, 7 Wheat. 535; *Langer* v. *Felton*, 1 Rawle, 141; *Hathorne* v. *Haines*, 1 Greenl. 247; *Stone* v. *Wyse*, 7 Connect. R. 214; *Douglass* v. *Scott*, 5 Ohio R. 194, *Bond* v. *Swearingen*, 1 Ohio R. 412; *Allen* v. *Parish*, 3 Ohio R. 116; *Fite* v. *Doe*, 1 Blackford, 131, *Coe* v. *Talcot*, 5 Day, 88; Stearns on Real Actions, (2nd edit.) 34, *et seq.*

So where a man having title to land, stands by and knowingly permits another to give a deed of it, without making his claim known, he is estopped from afterwards setting up his title. *Henderson* v. *Overton*, 2 Yerger, 394. So a person standing by and suffering another to build on his land, forfeits his claim to the land. *Tarrant* v. *Terry*, 1 Bay, 239.

But a *release* does not create an estoppel against a title subsequently acquired, either in the releasor or in those claiming under him. *Comstock* v. *Smith*, 13 Pick. 116; *Right* v. *Bucknell*, 2 Barn. & Adol. 278; *Jackson* v. *Winslow*, 9 Cowen, 18, 19; *Jackson* v. *Hubble*, 1 Cowen, 616. But see *Bensley* v. *Burdon*, 2 Sim. & Stu. 519; *Russell* v. *Coffin*, 8 Pick. 153. Neither does a covenant that a party has a good right to convey, create an *estoppel* against a subsequent title. *Allen* v *Sayward*, 5 Greenl. 227.

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And if this be law, there cannot be any sound principle which should limit a title thus acquired to a claim by the grantor or his representatives. It would be but a feeble title which would not enable the holder to defend his possession against trespassers, or those who should attempt to disseise him after his title is established. Nor does the doctrine in any degree tend to set up or give validity to conveyances made in violation of the statutes against champerty, maintenance, or buying of pretended titles, which may be considered as part of our common law, for if they are avoided it is because the seisin was in other persons at the time of the conveyance holding adversely, and this known to the parties; whereas, according to the doctrine maintained, it is only against those who have sold the land and received the equivalent, and those who claim under them, and against mere strangers who usurp the possession without right or title, that the principle is to be applied.

It has been the common understanding, that when one supposing he has a title, though in fact he has none, for a valuable consideration conveys land by deed with warranty, and afterwards purchases, his new title shall accrue to the benefit of his grantee. There are many cases which seem to be founded upon this principle. Thus in the case of *Terrett* v. *Taylor*, 9 Cranch, 43, it was held that a deed which did not operate by way of grant to convey a fee, yet having a general warranty binding the grantor and his heirs for ever, operated by way of estoppel to confirm a title, and the deed thus operating was
61 set up against the defendants who were not parties nor privies, but came in in the post under another title. This tacitly admits the doctrine we are maintaining, for the action could not have been supported without such admission. And the case of *Mason* v. *Muncaster*, 9 Wheat. 454, was decided on the same principle. The same doctrine is recognised in several New York cases. Thus in *Jackson* v. *Matsdorf*, 11 Johns. R. 97, *Thompson* C. J. says a deed containing a warranty will pass any title subsequently acquired by the grantor. And the cases of *M'Crackin* v. *Wright*, 14 Johns. R. 194, and *M'Williams* v. *Nisly*, 2 Serg. & Rawle, 515, are of the same character. We have not found any decided cases which contradict these, unless the case of *Davis* v. *Hayden et. al.*, 9 Mass. R. 519

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should be so considered. The deed from John Davis to his brother Edward of one seventh part of the land demanded in the action, was held to convey nothing, because at the time of making it the grantor had nothing in the land, being only heir apparent.[1] The intention was to convey one seventh of what was supposed to be a vested remainder, Edward Davis the elder being in possession, having as was supposed a life estate only in the premises. The question of estoppel or rebutter was not presented in that case, nor does it appear by the state of facts reported that the deed of John to his brother Edward was with warranty ; which is an essential feature in the doctrine established by the other cases.

We have before adverted to a distinction between a deed of land of which there is not any adverse possession at the time, and one which is given when the grantor is actually disseised and this fact known to the grantee at the time. In the latter case, by the policy of the law and in virtue of ancient statutes, perhaps the deed would be wholly inoperative, both parties being transgressors in relation to such conveyance ;[2] but where the disseisin of the grantor is not known, which may be the case where the land granted is remote from the domicile of the parties, as no offence will have been committed, there seems to be no good reason why the contract between the parties should be defeated. And the history of our judicial proceedings will show that this distinction has been recognised, for there 62
are numerous cases of grants by proprietors of land of which they were in fact disseised at the time of the grant; and in order to remove the disseisin, actions were brought in the name of the proprietors and recoveries had, after which the grantee has entered under his grant and maintained his title without any

[1] If an heir apparent sells a reversion, in the lifetime of his father, at an undervalue, the court will not, in favor of such a purchaser, decree a specific performance of the covenant for further assurance. *Johnson* v. *Nott*, 1 Vern. 171. See also *Boynton* v. *Hubbard*, 7 Mass. R. 112.

[2] *Brinley* v. *Whiting*, 5 Pick. 348, *Cleverley* v. *Whitney*, 7 Pick. 36; *Swett* v. *Poor*, 11 Mass. R. 549; *Bowers* v. *Porter*, 4 Pick. 198; *Walcott* v. *Knight*, 3 Mass. R. 418; *Everenden* v. *Beaumont*, 7 Mass. R. 78; *Prescott* v. *Heard*, 10 Mass. R. 60; *Patridge* v. *Strange*, 1 Plowd. 88 *a*; Co. Lit. 214 *a*; *Williams* v. *Jackson*, 5 Johns. R. 489; *Stoever* v. *Whitman*, 6 Binn. 420; *Aldridge* v. *Kincaid*, 2 Lettell, 393; *Warren* v. *Childs*, 11 Mass. R. 225; 4 Kent's Comm

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question in relation to subsequent disseisors; from which it is to be inferred that none but those who were in possession at the time when the grant was made, can avail themselves of the want of seisin of the grantor at the execution of the deed.[1]

In the case before us there is nothing which would implicate the grantee in the offence of buying pretended titles. At the time of the execution of the deed by W. S. S. to Somes the intestate, it was believed that this was a proper form of conveyance to carry into effect a contract, which to all appearance was just and fair. Until then the legal title was in Codman, as mortgagee, and the whole sum due on the mortgage was paid by the intestate, who, if he had rested on his deed from Codman, would have had an indisputable title to the whole of the tenement as security for his money. The mode unfortunately adopted let in J. S. the father under his deed, which had been legally supplanted by Codman's deed, so that it was only by this blunder J. S. the father could claim any thing; and indeed he never seems to have asserted any claim during his life, living it is true on the premises, as did W. S. S., and probably well knowing the claim which Codman had as mortgagee. Justice requires that whatever came to W. S. S. through his father should now be enjoyed by Somes, and we are satisfied that the law will support this claim.

It was objected at the argument, that though this be the law, yet that under the declaration in which the demandant has counted upon an entire seisin of the whole estate, a judgment cannot be rendered for an undivided moiety. This objection appeared formidable when first stated, but having since had occasion to consider this question very deliberately in the case of *Dewey* v. *Brown*, 2 Pick. 387, we came to the conclusion, upon very satisfactory principles, that the objection has no validity.[2]

63 According to the agreement of the parties therefore in this case, the verdict is to be so altered as that the demandant shall recover seisin and possession of one undivided moiety of the

[1] *Swett* v. *Poor*, 11 Mass. R. 554.

[2] Stearns on Real Actions, (2nd edit.) 219; *Inglis* v. *Sailors' Snug Harbor*, 3 Peters, 134, 157, 189; *Clanrickard* v. *Sidney*, Hob. 272, 282; *Polyoke* v. *Haskins*, 9 Pick. 264; Revised Stat. *c.* 101, § 11.

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premises described in the writ; and the judgment will be conditional, as in an action upon a mortgage.[1] Somes v. Skinner.

COMMONWEALTH *versus* ANN ROBBINS.

Upon the trial of an indictment against a married woman for larceny, evidence that her husband deposited a sum of money to procure the absence of a witness on the part of the government is inadmissible, unless it is shown that she was privy to the transaction.

THE defendant having been convicted before the Municipal Court, upon an indictment for larceny from the person, appealed to this Court. Upon her trial here evidence was admitted, after objection by her counsel, that her husband deposited a sum of money for the use of the person whose property she had stolen, to be paid over to him in case he should not appear at the Municipal Court to testify against her, and that this sum was afterwards paid over to him, he not having appeared according to his recognizance. There was no evidence that the defendant was privy to the attempt by her husband to compound the prosecution, but as the larceny by some one was clearly proved, and as the circumstantial evidence was strong against the defendant, the jury were instructed that they might infer her privity and consent to this act of her husband.

The jury found a verdict against the defendant, and if the evidence above mentioned was improperly admitted, a new trial was to be granted.

The case was shortly spoken to by *Morton*, Attorney General, for the commonwealth, and *A. Moore* for the defendant. *July 9th.*

PARKER C. J. said the Court had come to the determination, that the evidence of acts done by the defendant's husband without her knowledge, was improperly admitted, and that a new trial must be granted. *July 12th.*

[1] 1 Powell on Mortg. (Ran l's edit.) 262 *a*, note; 2 id. 499 *a*; Revised Stat. c. 107, § 3, 4, 5, 6.

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EWER *versus* JOHN BEARD and JOHN B. BEARD.

Two defendants in an action of *trespass* joined in their plea, and in the Court of Common Pleas judgment was given in favor of one and against the other. The plaintiff appealed from both judgments, and in this Court the judgment was in favor of both defendants. *Held*, that they were not entitled to several costs.

TRESPASS *quare clausum fregit*. The defendants pleaded jointly, and in the Court of Common Pleas a verdict was found in favor of one and against the other, and several judgments were rendered accordingly. The damages recovered by the plaintiff being small, he appealed from both judgments and entered into a recognizance in which he acknowledged himself severally indebted to the defendants to prosecute the appeal. On the trial in this Court the defendants joined in their defence, and a verdict and judgment was given in favor of both.

July 14th. And now *Rand*, for the defendants, claimed several costs, on the ground that the verdict and judgment in the court below was a severance of the two defendants. *Brown* v. *Stearns et al.*, 13 Mass. R. 536.

Shaw, *contrà*, cited *Mason* v. *Waite et al.*, 1 Pick. 452.

July 15th. *Per Curiam*. The appeal of the whole case vacated the judgment below. The cause was tried and determined as a joint action in this Court, and the defendants cannot be allowed several costs.[1]

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[1] See *West* v. *Brock*, *post*, 303; *Griswold* v. *Sedgwick*, 3 Wendell, 326, Howe's Pract. 302.

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HENRY WILLIAMS *et al. versus* JOHN M. MARSTON, Principal, and JOHN BAKER and CHARLES THACHER, Trustees.

A gave his note in payment for goods purchased by B through a broker, and took the goods to sell on commission as security for his liability. After he had sold them at a profit, but before he had received payment for them, B was summoned as a trustee of the broker, who was to have part of the net profits. *Held*, that he was not chargeable, it being contingent whether any net profits would ever come into his hands.

If, after the service of a trustee process by leaving a copy, the person summoned shall, *bonâ fide*, before actual notice of the service, make a payment, or give or accept a negotiable security in favor of the principal debtor, which shall have been negotiated before notice, he will be protected against the trustee process. *Semble.*[1]

Aliter, where he has reason to suppose such service has been made, and he nevertheless makes a payment &c. with a view to assist the principal debtor in defeating his creditors of their debts. *Semble.*

IT appeared from the answers of the supposed trustees, that in June, 1823, Baker purchased a cargo of lemons and oranges; that Marston was employed as a broker to make the purchase, and was to have one third part of the net profits upon a resale; that Thacher, at Baker's request, gave his note for the lemons and oranges, and took them to sell on commission as security for his liability; that at the time when the trustee process was served all the fruit had been sold at a profit, some of it by Thacher himself, and the rest by consignees in different places, who had orders to sell for cash, but that Thacher had not then received so much of the proceeds as would be sufficient for his indemnity.

It further appeared from the answers of Baker, that Marston came to his store on the 18th of July, at about 4 o'clock in the afternoon; that he said Thacher had been summoned as his trustee, but did not say that Baker's name also was in the writ; that he then drew, and Baker accepted, an order payable to Marston's own order and to be charged to him on account of the amount which Baker might receive for his interest in the lemons and oranges; and that Baker, knowing Marston to be insolvent, suspected that he drew this order to prevent Baker's being

[1] Provision is made for such a case in Revised Stat. *c.* 109, § 5.

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summoned as his trustee, or to raise money for his immediate necessities.

The trustee process was served on Baker on the same 18th of July, at 3 o'clock in the afternoon, by leaving an attested copy at his dwellinghouse, but he stated that he did not receive the copy till half past 6 o'clock, when he returned to his house.

The question was, whether Baker should be charged as trustee.

March 8th, and July 13th.

Morey, for the plaintiff, contended, 1. that Baker was indebted to Marston and that the debt was attachable by this process. *Fisk* v. *Herrick & Tr.* 6 Mass. R. 271. There was no contingency here, as in *Davis* v. *Ham & Tr.* 3 Mass. R. 33, but the proceeds of the goods were in the hands of Baker, or of his subagents, which is the same thing. *Frothingham* v *Haley & Tr.* 3 Mass. R. 68.

2. The service of the writ, having been made in one of the modes prescribed by the statute, is binding from the time when it was made, as in the case of an attachment of real estate Though there may be hard cases where a trustee makes a payment to the principal debtor before he has actual notice of the service, yet that cannot change the law; and there will be no hardship in the present case in charging Baker, for he had reason to suppose that a service had been made. What is sufficient to put a party on inquiry, is equivalent to notice. 2 Fonbl. on Eq. 151; *Johnson* v. *Bloodgood*, 1 Johns. Cas. 53. But if there was not notice, still as the order was accepted for the purpose of assisting Marston to defeat his creditors, Baker will be held as trustee.

Merrill, *contrà*, cited *Touro* v. *Coates & Tr.* 10 Mass. R. 25; Co. Lit. 360 *a*; *Bury* v. *Hartman*, 4 Serg. & Rawle, 175; *Mandeville* v. *Welch*, 5 Wheat. 285; *Lyndon* v. *Gorham et al.*, 1 Gallis. 367.

July 15th.

PARKER C. J., in giving the opinion of the Court, said in substance, that when the writ was served, it was contingent whether Baker would become indebted to Marston, as the price for which the fruit was sold had not been received.[1] His

[1] See *Faulkner* v. *Waters*, 11 Pick. 474; *Willard* v. *Sheafe*, 4 Mass. R. 235 *Thorndike* v. *De Wolf*, 6 Pick. 120; *Tucker* v. *Clisby*, 12 Pick. 22; *Rundlet* v

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acceptance of the order was not an acknowledgment of an actually existing debt, as he might depend on being indemnified out of the money which he was about to receive. In this view of the case it became unnecessary to consider the effect of the order upon the trustee process, in case a debt had existed at the time of the service of the writ. A payment made *bonâ fide* without knowledge of the service ought to be in justice, and we think it would be in law, protected. So a negotiable note or acceptance, if negotiated before notice of the service, would probably be saved. From the circumstances disclosed however in this case, we are inclined to think Baker would be liable if he had had funds in his hands, for he knew that Thacher had been summoned as trustee and that the order was a contrivance to help Marston to defeat his creditors.[1]

Trustees discharged.

DANIEL CLARK *et al.*, Appellants, *versus* JONATHAN WRIGHT, Executor.

A codicil fraudulently destroyed was established upon parol proof of its contents.

THIS was an appeal from a decree of the judge of probate approving and allowing a certain paper, dated the 1st of May, 1811, as the last will of William Clough.

The appellants, heirs at law of the deceased, pleaded that this paper ought not to be allowed as his last will, because they said that in 1820 he made and published a codicil making a material alteration in his will, and that the will and codicil

Jordan, 3 Greenl. 47; *Staples* v. *Staples*, 4 Greenl. 532; *Sayward* v. *Drew*, 6 Greenl. 263; *Coit* v. *Bull*, Kirby, 149; *Kidd* v. *Shepherd*, 4 Mass. R. 238. But an unadjusted claim for a loss on a policy of insurance is subject to the process of foreign attachment. *Knox* v. *Protection Ins. Co.* 9 Connect. R. 430.

[1] It is now settled, however, that if a debtor, at the request of his creditor, in order to avoid being summoned and charged on the trustee process, gives his own negotiable note to the creditor for the amount due, he will not be chargeable as the trustee of the creditor. *Wood* v. *Bodwell*, 12 Pick. 268. See *Dennis* v. *Hart*, 2 Pick. 204.

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Clark v. Wright.

thereon were taken from his possession without his consent, and by collusion, and the codicil torn off and destroyed. And upon issues to the country it was found that he did make and publish a codicil, and that it had been fraudulently torn off from the will.

The will contained several devises, and the codicil, according to a paper exhibited as a copy, affected only one of them, the testator having substituted Susanna Clark and her children as devisees of one parcel of land, instead of Ann Clough, who died before the making of the codicil.

A petition was presented to the Court by William Clough,
68 a devisee under the original will, praying that he might be permitted to become a party to this suit.

The cause was argued first at this term, and afterwards at October term 1825 in Middlesex.

Webster and *Hubbard* for the appellee and the petitioner. The decree of the judge of probate is to be sustained. The *St.* 1783, *c.* 24, § 1, provides, that "no devise in writing, of lands, tenements, and hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his direction and consent," &c. This will has not been revoked in any one of the modes here mentioned, and as to the codicil, that was destroyed without the consent or knowledge of the testator. The codicil may or may not have altered the provisions of the will, for it may have been only a devise of subsequently acquired estate; and unless the contents of the codicil are proved, the Court cannot say that any alteration has been made, and the will remains good. *Harwood* v. *Goodright*, Cowp. 87.

But we say further, that the codicil, whether it relates to real or personal estate, may be set up on parol evidence of its contents, and the authorities are decisive on this point. Toller's Law of Executors, 71; *Haines* v. *Haines*, 2 Vern. 441; *Trevelyan* v. *Trevelyan*, 1 Phillim. 149; *Scruby* v. *Fordham*, Addams, 74; *Foster* v. *Foster*, ibid. 462; *Legare* v. *Ashe*, 1 Bay, 464; *Dalston* v. *Coatsworth*, 1 P. Wms. 731, and *Woodrooff* v. *Burton* there cited; *Onions* v. *Tyrer*, ibid. 345; *Ex parte The Earl*

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of Ilchester, 7 Ves. jun. 372. Where a deed is lost or destroyed it is every day's practice to admit secondary evidence.

PARKER C. J. I see no difference in this respect between a deed and a will. It would be a cause of great injustice, if the accidental or fraudulent destruction of such instruments should deprive parties interested, of the right to give evidence of their contents.

Prescott and *Bliss*, for the appellants, seemed to yield the point of the admissibility of parol evidence to prove the codicil.

PARKER C. J. The Court have no doubt but that the codicil may and ought to be proved.[1] It will be for the party claiming under it to consider whether he will make application here, or before the judge of probate, to have it allowed. 69

Webster suggested that this Court has power not only to reverse or affirm, but also to reform, the decree of the judge of probate.

He afterwards presented a written application on behalf of the appellee, praying that he might be allowed to prove the contents of the codicil, and that thereupon the same might be allowed and established, and stating that a paper exhibited was a true and exact copy of the codicil. Depositions were then offered, proving this paper to be a true copy, and the same was thereupon allowed as a codicil ;* and the Court directed the clerk to record at large the application of the appellee, the copy of the codicil, and the depositions.

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[1] See Swinb. *pt.* 6, § 14, *pl.* 4; *Martin* v. *Laking*, 1 Haggard, (Doct. Com.) 244; *Davis* v. *Davis*, 2 Addams, 224; *Parker* v. *Hickmott*, 1 Haggard, (Doct. Com.) 211; *Huble* v. *Clark*, 1 Haggard, (Doct. Com.) 115; *James* v. *James*, cited in note to *Lillie* v. *Lillie*, 3 Haggard, (Doct. Com.) 185; Williams on Executors, *pt.* 1, *bk.* 4, *c.* 3, § 7; *Jackson* v. *Russell*, 4 Wendell. 543; *Fetherly* v. *Waggoner*, 11 Wendell, 599.

* The decree was as follows. — And now, on the motion or petition of the said Jonathan Wright, the executor, the jury having found that the said William Clough, the testator, did, after the execution of his said will, duly make and publish a codicil thereto, which said codicil was afterwards fraudulently torn off and destroyed; and the paper writing in the cause, marked A, having been propounded as a true and exact copy of the said codicil, and probate and allowance prayed; and the Court having proceeded to take evidence to prove the same paper A to be a true copy of said codicil, and being satisfied thereof: — It is therefore ordered, adjudged, and decreed, that the said decree of the judge of probate, appealed from in this cause, allowing the said instrument as and for the will of the said William Clough, be and the same hereby

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HENRY ARCHIBALD *versus* THE MERCANTILE INSURANCE COMPANY.

Insurance was made on goods, the produce of the United States, on board an American vessel, "at and from Boston to St. Pierre's Miquelon, at and from thence to Boston, with liberty to proceed to St. John's, Newfoundland." The assured went to St. Pierre's, where he sold part of the goods, and with the residue he proceeded to St. John's, not knowing that such voyage was prohibited, and there the property was seized and condemned because it had not been brought directly from the United States. It was *held*, that the loss was not covered by the policy, the terms being general, and it not being known to the insurer that an illicit voyage was intended to be insured.

ASSUMPSIT on a policy of insurance made by the defendants on the 28th of June, 1823, whereby they assured to the plaintiff the sum of 2400 dollars "on property on board the schooner Polly, at and from Boston to St. Pierre's Miquelon, and at and from thence to Boston, with liberty to proceed to St. John's, Newfoundland." At the foot of the policy was the following memorandum:—"It is further agreed, that in case of capture or detention the assured shall not have a right to abandon therefor, until proof is exhibited of a condemnation, or of a continuance of the detention by capture, or other arrest, at least ninety days."

The vessel, with property on board belonging to the plaintiff consisting principally of flour, proceeded to St. Pierre's, where she arrived on the 5th of July, 1823, and having there landed and sold some of her flour and the residue of her cargo, she sailed from thence on the 6th of August, with 273 barrels of the flour on board, for St. John's, Newfoundland, where she arrived on the 12th of the same month. The plaintiff was on board and took due measures to enter his vessel there, but understanding that he would not be allowed to enter the vessel

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is affirmed.—And it is further ordered, adjudged, and decreed, that the said codicil, as written and expressed in the said paper marked A, be, and the same hereby is, received, approved, and allowed as and for a codicil to the said will of the said William Clough deceased; and that an examined copy of this decree, together with the original will as proved and allowed by the judge of probate for the county of Suffolk, and the codicil proved and allowed as aforesaid in this Court, be remitted to the said judge, that he may farther proceed in the premises according to law

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and dispose of her cargo, he applied for leave to depart with the vessel and cargo, but they were both seized, libelled and condemned, on the allegation of having violated the revenue laws of Great Britain by having come from an intermediate foreign port, the cargo being the produce of the United States.

Archibald v. Mercantile Ins. Co.

The statute of 3 *Geo.* 4, *c.* 44, § 3, (passed on the 24th of June, 1822,) enacts that from and after the passing of the act it shall be lawful to import into any of the ports enumerated in schedule A (of which St. John's is one) from any foreign country, &c., articles enumerated in schedule B (of which flour is one) under certain restrictions, of which it is necessary to state only the following:—"Provided always, that no articles enumerated in the said schedule shall be imported in any foreign ship or vessel, unless shipped and brought directly from the country or place of which they are the growth, produce, or manufacture." Upon the trial of the libel before the judge of the Vice Admiralty Court of the province it was determined, that this vessel, by going to St. Pierre's and selling part of her cargo there, came within the proviso, and was not protected from forfeiture, and accordingly the vessel with the cargo carried to St. John's was decreed to be forfeited. 71

Evidence was admitted, though objected to by the plaintiff, to show that when the application for insurance was made nothing was said on the subject of the voyage being contrary to the laws of Great Britain, that the premium was at the usual rate for common risks on such a voyage, and that the memorandum was in a form adopted by all the insurance offices upon the breaking out of the war between France and Spain, (being similar to one which was in use during the preceding continental war,) which was discontinued on the restoration of peace.

A verdict was taken for the plaintiff, subject to the opinion of the whole Court.

Prescott and *Welsh* for the defendants. The rule of law is well settled, that the general words in a policy of insurance do not cover an illicit voyage; but if a party wishes to insure against a seizure for a breach of foreign revenue or trade laws and discloses such intention to the underwriters, the general words may be sufficient; or such risk may be expressly stated in the policy; or if the insurance is to a port where none but illicit July 5th.

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trade can be carried on, it may be implied, where it is not excepted in the policy. Here there was no intention on the part of the plaintiff to be engaged in an illicit voyage, and the policy does not in express terms cover such a risk; *Pollock* v. *Babcock*, 6 Mass. R. 234; *Richardson* v. *Maine F. & M. Ins. Co.* ibid. 112, 114; *Parker* v. *Jones*, 13 Mass. R. 173, and as there was a permitted trade to St. John's, it will be presumed that the underwriters took the risk of a lawful voyage only. In the case of *Andrews* v. *Essex F. & M. Ins. Co.* lately determined in the Circuit Court of the United States before *Story* J. [3 Mason, 6,] where the vessel was insured to Kingston, Jamaica, which both parties supposed to be an open port, when in fact it was not, and so the vessel was seized for illicit trade, it was held that the underwriters were not liable They cited also Valin sur L'Ord. de la Mar. *liv.* 3, *tit.* 6, *art* 49; *Lever* v. *Fletcher*, 1 Park on Ins. (7th ed.) 360; *Vos* v *United Ins. Co.* 2 Johns. Cas. 180.

W. Sullivan contrà. The regulations of Great Britain in regard to trade with her colonies and the change effected in 1822 by *St.* 3 *Geo.* 4, *c.* 44, were as well known to one party as to the other, and by the use of general words the defendant impliedly assumed the risk by which the loss was occasioned; for if an insurer does not except a risk comprehended in the words of the policy, he must be supposed to have taken such risk. *Meyne* v *Walter*, Park on Ins. (7th ed.) 306; *Richardson* v. *Maine Ins. Co.* 6 Mass. R. 112. The case of *Pollock* v. *Babcock* is in favor of the plaintiff.

Jan. 14*th*, 1826.

PARKER C. J. delivered the opinion of the Court. The plaintiff claims indemnity of the defendants, on the ground that this is a loss covered by the general terms of the policy, or at least that it is within the meaning of the memorandum at the foot of the policy.

The general question is, whether by the terms of the contract, as expressed in the body of the policy, the defendants took the risk of an illicit voyage to St. John's; for between these parties the importation into St. John's must be deemed to be illicit, it having been so determined by a court of competent jurisdiction and there being no ambiguity in the sentence as to the cause of condemnation. Nor is there any reason to

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doubt that the Admiralty Court decided right upon the subject, according to the laws by which it was bound to govern itself.

The law is clearly settled, that an insurance does not cover an illegal voyage, unless by the terms of the contract the intention to do so is expressed, or unless the voyage insured is known to the assurer to be illegal, at the time when he makes the contract; in which latter case the intention is implied. See 6 Mass. R. 102 and 234, 13 Mass. R. 173, before cited, and numerous other cases cited by Mr. Justice *Story* in *Andrews* v. *Essex F. & M. Ins. Co.*[1] There is no such intention expressed in this policy; it is in the common form of such contracts where the ordinary perils are intended to be taken.

But it is argued, that this intention is to be inferred from the fact, that the property was insured on a voyage to St. Pierre's, with liberty to go to St. John's. If the defendants had known and must be supposed to have consented that the vessel should go to St. Pierre's and there sell part of her cargo, and from thence to St. John's to finish her outward voyage, there might be some reason to charge them with the knowledge which would make them liable.

By the policy the plaintiff was allowed to take his property to St. John's. The true effect and meaning of this was, to go there in a lawful way. If on touching at St. Pierre's it was found that the cargo could not be disposed of there, she might proceed to St. John's, but it cannot be inferred that it was the intention to allow a sale of part of the cargo at St. Pierre's and the rest at St. John's. Or if this was contemplated, it was because both parties were ignorant that this would be deemed illicit; and this ignorance would repel any implication that an illicit voyage was intended to be insured. Neither of the parties contemplated a violation of the revenue laws of any country; but such violation has occurred. The consequences rest altogether upon the assured, because he is secured against

[1] 3 Mason's R. 6, 18, 20; *Planché* v. *Fletcher*, 1 Doug. 251; Roccus De Ass note 21; *Gardiner* v. *Smith*, 1 Johns. Cas. 141; 2 Phillips on Ins. 193, *c.* 13, § 10; *Maryland and Phœnix Ins. Co.* v. *Bathurst*, 5 Gill & Johns. 159; *Cook* v. *Essex Marine Ins. Co.*, 6 Mass. R. 122; *Wheatland* v. *Gray*, 6 Mass. R. 124; *Breed* v. *Eaton*, 10 Mass. R. 21; *Hayward* v. *Blake*, 12 Mass. R. 176; *Russell* v. *Degrand*, 15 Mass. R. 35; *Carrington* v. *Merchants' Ins. Co.*, 8 Peters, 495.

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nothing but what was within the express terms or the fair implication of the contract. It is a misfortune against which he has not protected himself.

We do not think the case is made any stronger for the plaintiff by the memorandum. In case of capture or detention no abandonment was to be made until proof should be exhibited of a condemnation, &c. This is only a qualification or restriction of the rights of the assured in case of loss under the policy. Capture, detention, &c., must mean illegal arrest, seizure, &c. such as by the general terms of the policy the underwriters are answerable for; but cannot be extended to enlarge the risk of the underwriters to cases not reached by the words in the body of the policy.[1]

The testimony which was admitted to show the purpose for which this memorandum was at first introduced, was therefore wholly immaterial, and whether it was rightly admitted or no cannot affect the question before us.

The verdict must be set aside and a general verdict entered for the defendants.

TITUS WELLES, Executor of Abraham Touro, *versus* EBENEZER FISH and NATHANIEL WINSOR.

To a plea of the statute of limitations in an action to recover back money paid, it is a good replication that the money was paid in consequence of a fraudulent concealment on the part of the defendant, and that the plaintiff did not discover the fraud until within six years before the commencement of the action.[2]

In general a deposition taken *in perpetuam* under *St.* 1797, *c.* 35, § 8, at the request of A upon notice to B, cannot be used in an action against B by C, a stranger not claiming under A, neither can A use it against any other person than B, or one claiming under him, unless such person lived more than twenty miles from the place of caption.[3]

THIS was an action for money had and received, brought to recover back the amount of the testator's subscription to a policy of assurance upon the schooner Jefferson, belonging to the defendants, on which a total loss had been paid on the 18th of

[1] See *Levy* v. *Merrill*, 4 Greenl. 180; 2 Phillips on Ins. 191, 192, *c.* 13, § 9

[2] The law upon this point is settled by Revised Stat. *c.* 120, § 12.

[3] See Revised Stat. *c.* 94, § 38.

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September, 1813. The money was sought to be recovered back, on the ground, that at the time when the policy was subscribed the loss of the vessel was known to one or both of the defendants, and so that the insurance was fraudulently obtained. The defendants pleaded the general issue and the statute of limitations. To this last plea the plaintiff replied, setting forth 75
the fraud practised by the defendants and averring that the testator did not discover it until within six years before the commencement of the suit; to which there was a general demurrer.

At the trial of the cause the judge admitted in evidence the deposition of Betsy Knox, taken *in perpetuam*, before the institution of this action, at the request of one Homer and others, underwriters on the same policy, but not at the request of the plaintiff or his testator. If the deposition was improperly admitted a new trial was to be granted.

L. Shaw for the defendants. The plaintiff waives the tort *March 11th*
and sues in *assumpsit*. The promise, if any, was made in 1813. The plaintiff says he ought not to be barred by the statute of limitations, because the testator paid the money in consequence of a fraudulent concealment; but he ought to state that fraudulent means were used after the action accrued, such as falsifying records or accounts, &c., to prevent the testator from coming at a knowledge of the facts. If this replication is sustained it will repeal the statute, so far as concerns actions founded on fraud, for a party will have only to say that he did not discover the fraud until within six years. But does this present an issue which can be tried at common law? And what is a discovery? Shall it be full proof of fraud? Certainly not; it is enough if the inference of fraud may be drawn from circumstances. A party is not to say that he will pay the money and will get proof of one circumstance one year and of another the next, and so on, till his evidence shall be sufficient to convince a jury of the fraud, and then he will recover the money back. There is a peculiar propriety in applying the statute to cases of this kind, because fraud is commonly proved or disproved by many little circumstances. The question is not whether fraud, if proved, shall be protected, but whether evidence of it shall be admitted after such a lapse of time.

The deposition of Betsy Knox should have been rejected,

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because it was *res inter alios acta*. It was an answer to such questions only as were put to the witness, and it is to be considered as a partial representation of facts in regard to persons who had not an opportunity to be present. In a deposition taken at the request of Homer, it would have been impertinent in the defendants to put interrogatories relating to the claim of the plaintiff's testator. *Berkeley Peerage Case*, 4 Campb. 412.

Gorham and *Curtis*, for the plaintiff, referred on the first point to *Homer* v. *Fish et al.*, 1 Pick. 435, and the cases there cited; and in regard to the deposition they relied on *St.* 1797, *c.* 35, § 8, which says that a deposition taken *in perpetuam* may be "used as evidence in any cause to which it may relate." In the provision in the same section, that the deposition shall be recorded in the registry of deeds of the county where the land lies, if it respects real estate, and if it relates to personal estate, in the registry of deeds of the county where the person lives for whose use it is taken, the place of recording is designated, merely that the deposition may be recorded somewhere, without any intention to restrict the use of it to any particular person.

Jan. 14th, 1826.

PARKER C. J. delivered the opinion of the Court. In relation to the point which grows out of the plea of the statute of limitations it is sufficient to observe, that it has been distinctly settled in the case of *Homer* v. *Fish et al.*, 1 Pick. 435. The authorities cited in support of the opinion given by the Court are equally applicable to this case.[1]

[1] See also *First Mass. Turnp. Corp.* v. *Field*, 3 Mass. R. 201; *Bishop* v. *Little*, 3 Greenl. 405; *Morton* v. *Chandler*, 8 Greenl. 9; *Cole* v. *McGlathry*, 9 Greenl. 131; *Payne* v. *Hathaway*, 3 Vermont R. 212; *Sherwood* v. *Sutton*, 5 Mason, 143; *Mussi* v. *Lorain*, 2 P. A. Brown's (Penn.) R. 59; *Jones* v. *Conoway*, 4 Yeates, 109; *Pennock* v. *Freeman*, 1 Watts, 401; *Bertine* v. *Varian*, 1 Edward's Ch. R. 342; *Hunter* v. *Spotswood*, 1 Wash. 146; *Harrell* v. *Kelly*, 2 M'Cord, 426; *Croft* v. *Arthur*, 3 Desaus. 223; *Cowper* v. *God mond*, 9 Bingh. 748; *Clark* v. *Hougham*, 2 Barn. & Cressw. 149; *Brown* v. *Howard*, 4 B. Moore, 508; *Granger* v. *George*, 7 Dowl. & Ryl. 729; *S. C.* 5 Barn. & Cressw. 149; *Howell* v. *Young*, 5 Barn. & Cressw. 259; *Ex parte Bolton*, 1 Mont. & Ayrton, 60. But see *Troup* v. *Smith*, 20 Johns. R. 33; *Oothout* v. *Thompson*, 20 Johns. R. 277; *Hamilton* v. *Sheppard*, 2 Murphey, 115, *Thompson* v. *Blair*, 2 Murphey, 583; *Sweat* v. *Arrington*, 2 Haywood, 129; *Croft* v. *Townsend*, 3 Desaus 239; *Wamburzee* v *Kennedy*, 4 Desaus. 474.

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In regard to the deposition of Betsy Knox, there is an insuperable difficulty. It was not taken for this action, and a deposition taken *in perpetuam* can be used only by those at whose request it was taken, or some one claiming title to the subject matter to which it relates under such persons. The words in the statute, that a deposition taken according to the form prescribed may be used in certain contingencies in any cause to which it may relate, must be restricted to the sense intended by the legislature which used them. We think it could not be intended, that a deposition thus taken at the special request of one person, might be resorted to by any stranger as evidence of his interest in property, which interest may have accrued in a manner wholly independent of the party who caused it to be taken; for though it may seem to be no prejudice to the party whose interests are to be affected by it, if he had 77
notice, or was beyond the distance which makes notice necessary,[1] yet it may be important to him to know at whose instance, or on whose account he is summoned to hear testimony, as with one person he may intend to have no controversy, though in regard to another he may intend to resist a claim. So he may think he has a complete defence against one, whatever may be his evidence, and may not be so well prepared against another.

The cases which have arisen on the subject of this suit will illustrate the different degree of interest which a defendant may have in being present at the examination of witnesses. In the case of Homer the defendants, on receiving notice to attend the taking of a deposition, upon application to their counsel may have learned that they were in no jeopardy, because the subject matter of the contemplated suit might have been determined on a former suit between the parties, and that Homer would not be

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Callis v. *Waddey*, 2 Munf. 511; *Shelby* v. *Shelby*, Cooke's (Tenn.) R. 183; *Whalley* v. *Whalley*, 3 Bligh, 2; 1 Chitty's Gen. Pract. 766.

The operation of the statute of limitations is, however, unaffected by fraud, if the party upon whom the fraud is practised had full means of detecting it *Farnam* v. *Brooks*, 9 Pick. 212; *Cole* v. *McGlathry*, 9 Greenl. 131.

[1] The want of notice is held to be no valid objection to a deposition taken *in perpetuam rei memoriam*, under the province statute 7 Will. 3, *c.* 35, § 3; *Goodwin* v. *Mussey*, 4 Greenl. 88. And such deposition may be used when the deponent is sick and unable to attend court. *Ibid*

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allowed to sustain an action upon facts which he might have shown in defence of the action against him by the defendants; whereas in the case of Touro they have no such defence to set up, and therefore it might be of the greatest importance that they should cross-examine the witness whose deposition was proposed to be taken. And the circumstance that the present suit arises out of the same contract which gave Homer his cause of action is not material, for the rights of Homer and Touro were several and independent, as though they had subscribed separate policies, and it is for this reason that the defendants cannot now defend themselves on the ground that an action had been tried, in which the merits of the question might have been decided.

We think for these reasons that the deposition of Betsy Knox should not have been admitted in this action, and that this construction of our statute respecting depositions *in perpetuam* should be recognised.

This statute provision undoubtedly was intended as a substitute for the bill in chancery to perpetuate evidence, as practised in England, which was expensive and dilatory; but the
78 rules applicable to evidence thus taken were founded in a wise regard to the security of those whose interests might be affected by testimony taken out of the course of the trial, when the opportunity to sift and examine the evidence might be imperfect. This caution is not less necessary with us under the statute, as much less security exists here than in the course adopted by the courts of chancery. 1 Madd. Chan. Pr. 185.

In Phillipps on Evidence, 267, it is stated, that depositions in a suit in chancery may be given in evidence in an action at law on the same matter between the same parties, or between any who claim under them; and (*p.* 268) depositions are not to be admitted in evidence for a party to a suit against a stranger who was not a party, *nor can they be used by a stranger* who was not a party *against either of* the parties.[1] And in 1 Gilbert (Lofft's ed.) 36, it is said, that if A prefer a bill against B, and B exhibit his bill against A and C, C cannot give in evidence the depositions in a cause between A and B. Bull. N. P. 232, 233. In *p.* 239, Buller says, "a deposition can-

[1] 12 Vin. Abr. 109, *pl.* 24; 1 Stark. Ev. 265; *Bondereau* v. *Montgomery*, 4 Wash. C. C. R. 186

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not be given in evidence against any person that was not party to the suit; and the reason is, because he had not liberty to cross-examine the witness; and it is against natural justice that a man should be concluded by proofs in a cause to which he was not a party. For this reason depositions in chancery shall not be read for or against the party defendant upon an information or indictment, for the king was no party to the suit." The rule, he says, admits of some exceptions, as in cases of customs and tolls and in cases where hearsay and reputation are evidence; or where the deposition is used to contradict what the same witness swears at a trial. And in *p.* 240; "a man shall not regularly take advantage of a deposition who was not a party to the suit, for, as he cannot be prejudiced by the deposition, he shall never receive any advantage from it."

It seems that in England depositions are to be governed by the same rules as verdicts, in respect to their admission as evidence, that is, none but parties and privies can make use of them. See *Lock* v. *Norbonne*, 3 Mod. 141; *Rushworth* v. *Countess of Pembroke et al.*, Hardr. 472. This latter case is very strong. Currier had presented a bill in the Exchequer 79
against the plaintiffs and others, tenants of a manor of the countess of Pembroke, for suit to his mill, which he claimed by prescription. Many witnesses were examined on both sides, and now upon this bill against the same Currier and the countess she wished to use the depositions taken for the former suit and was refused, because she was not a party to the former suit, and as she was not bound by the depositions, neither should she have advantage of them. This case in Hardr. is cited by Comyns, Dig. *Testm. Ev. C*, 4, and by Peake, Law of Evidence, (3d ed.) 64. Comyns says, a deposition cannot be used against him who is no party to the suit, nor claims under one, nor for a stranger against a party.

The words of our statute which provides for the taking and the use of depositions *in perpetuam* are undoubtedly very broad and general. A deposition taken pursuant to the statute "may be used as evidence in any cause to which it may relate." But the very extensiveness of this provision proves that a limitation according to pre-existing rules was intended. Surely it was not meant that any stranger might use a deposition thus taken, against

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Welles v. Fish.

any other stranger, if some facts in the deposition should happen to affect a cause between these two; and yet that would be within the words of the statute. The meaning must have been, that it shall be used by any party having a right by the rules of law to use it, in any cause, to the subject matter of which it has relation. And if it is not to be so restricted, there would seem to be no necessity or use in requiring the justices who shall take the deposition, to certify the names of all persons whom they notified of the taking thereof. No other person would be bound, unless he lived beyond the distance which requires notice, and no other person, we think, could use the deposition, unless it appeared that it was taken at his request, or at the request of those under whom he claims. There is another provision in the statute which carries a strong implication that the legislature did not intend that all persons might make use of a deposition so taken. If it relates to land, it is
80 to be recorded in the county where the land lies; if it respects personal estate, it is to be recorded in the county where the *person lives for whose use it is taken.*[1] This seems to limit the use of the deposition to the person who appears by the certificate to have caused it to be taken, and none other, except by the rules of law those who claim under such person. A caption that did not state at whose request the deposition was taken would be imperfect, and the deposition could not be used.[2] This would seem to be a superfluous provision, if any person might use it. Upon the whole we are of opinion that the deposition of Betsy Knox was improperly admitted, and for that cause only there must be a new trial.

[1] But now a deposition *in perpetuam*, if it relate to personal estate, is to be recorded in the county where the parties, or some of them, reside. Revised Stat. *c.* 94, § 37.

[2] Revised Stat. *c.* 94, § 23, 35.

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WILLIAM C. HALL *versus* JAMES YOUNG.

In an action brought in a State court against a foreign consul, it did not appear by the plaintiff's own showing, nor upon a plea to the jurisdiction, that the defendant was a consul, but judgment was rendered upon a default; and on *scire facias* against the bail it was *held*, that he could not take advantage of the want of jurisdiction in the original action.

SCIRE FACIAS against the defendant as bail of George Manners to a writ issued from the Court of Common Pleas.

The defendant pleaded in the Court of Common Pleas, 1. That Manners, at the time of the impetration of the original writ, was, and ever since had been, consul of the king of the United Kingdom of Great Britain and Ireland, duly accredited by the president of the United States; and to this there was a general demurrer: — 2. *Nul tiel record*; and upon this an issue to the court was taken. The plaintiff produced the record of the judgment in the original suit of Hall against Manners, which stated that Manners appeared at the return term, in April 1823, and pleaded to the jurisdiction of the court, that he was consul, &c., and that cognizance of the action belonged to the District Court of the United States; and the record further stated, that the action was continued to July term following for judgment final, and from thence to October term following to be defaulted; and that at that term Manners 81
made default, and thereupon judgment was rendered.

The judgment of the Court of Common Pleas on both issues was against the defendant Young; whereupon he filed his exceptions.

Bliss for the defendant. The courts of the United States *March 23d.*
have exclusive jurisdiction in cases relating to consuls.[1] U. S. Laws, 1 *Cong.* 1 *Sess. c.* 20, § 9; *Manhardt* v. *Soderstrom*, 1 Binn. 138; *United States* v. *Ravara*, 2 Dallas, 297; *Commonwealth* v. *Kosloff*, 5 Serg. & Rawle, 545; *United States* v. *Lathrop*, 17 Johns. R. 4. The arrest was therefore a nullity. *Pearce* v. *Atwood*, 13 Mass. R. 344; *Winslow* v. *Hathaway*,

[1] 3 Story's Comm. on Const. 523; 1 Kent's Comm. (2nd ed.) 45; Sergeant's Const. Law, 222; *Davis* v. *Packard*, 7 Peters, 276; *Cohens* v. *Virginia*, 6 Wheat. 396; *Osborn* v. *United States Bank*, 9 Wheat. 738.

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1 Pick. 211; *Turner* v. *Felgate*, 1 Lev. 95. If the original writ was voidable only, and on the ground of a personal privilege, the bail are nevertheless entitled to be discharged. *Crossley* v. *Shaw*, 2 W. Bl. 1087; *Merrick* v. *Vaucher*, 6 T. R. 50; *Robertson* v. *Patterson*, 7 East, 405; *Commonwealth* v. *Riddle*, 1 Serg. & Rawle, 311. So where they cannot surrender their principal. *Champion* v. *Noyes*, 2 Mass. R. 481 *Harrington* v. *Dennie*, 13 Mass. R. 93; *Bean* v. *Parker*, 17 Mass. R. 604. The plaintiff must be presumed to have known that Manners was a consul, and the Court will *ex officio* take notice of the fact.

As to the second plea, if the Court of Common Pleas had no jurisdiction, as appears by the facts stated in the first plea, there could be no record. And the bail may by plea take advantage of the want of jurisdiction. *Davol* v. *Davol*, 13 Mass R. 264; *Smith* v. *Rice*, 11 Mass. R. 514; *Martin* v. *Commonwealth*, 1 Mass. R. 347; *Lawrence* v. *Smith*, 5 Mass. R. 362.

Washburn for the plaintiff. Manners was not called consul in the original writ, and it not appearing of record that the Court of Common Pleas had no jurisdiction, they were obliged to render judgment against him. That judgment stands good until it shall be reversed on error. Upon a *scire facias* advantage cannot be taken of any thing which might have been shown as a defence in the original action. *Wilcox* v. *Mills*, 4 Mass. R. 218; *Thatcher* v. *Gammon*, 12 Mass. R. 269; *Champion* v. *Noyes*, *ubi supra*; *M'Farland* v. *Irwin*, 8 Johns. R. 77; *Mechanics' Bank* v. *Hazard*, 9 Johns. R. 392. The court refuses to take jurisdiction by consent, only where the want of jurisdiction appears on the record; here there was a personal privilege[1] which might be waived. *Full* v. *Hutchins*, 2 Cowp. 422; *M'Neil* v. *Bright*, 4 Mass. R. 303; *White* v. *Quarles*, 14 Mass. R. 453.

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Bliss, in reply, referred to *Taylor* v. *Phillips*, 3 East, 154, and *Alden* v. *Lee*, 1 Yeates, (Penns.) 160, and cases there

[1] Contra *Davis* v. *Packard*, 7 Peters, 276. The privilege of freedom from arrest, of an ambassador's servant, is the privilege of the ambassador and not of the servant. *Fisher* v. *Begrez*, 2 Crompt. & Mees. 240; 3 Tyr. Ex. R. 184; 2 Dowl. Pract. Cas 279; 4 Tyr. Ex. R. 35.

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cited, to show that the consent of a defendant cannot give jurisdiction.

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PARKER C. J. delivered the opinion of the Court to the following effect. If it had been shown upon a plea to the jurisdiction in the original action, that Mr. Manners was a consul, a judgment against him would have been erroneous, and the bail would be discharged. But that fact does not appear on the record in that action, and the agreement to be defaulted was a waiver of the want of jurisdiction.[2] It is said that all courts are to take notice of a person's being a consul, on account of his *exequatur*; but he may be a consul one day and cease to be such the next, and yet his *exequatur* may not be taken from him. When therefore he is sued, if he would avail himself of his privilege, he must make it appear that he was a consul, unless the other party shows it; as by calling him consul in the original writ.[3]

Judgment affirmed.

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[2] See *Bank of Utica* v. *City of Utica*, 4 Paige, 399. In *Davis* v. *Packard*, 7 Peters, 276, it was decided, that if a consul, being sued in a State court, omits to plead his privilege of exemption from the suit, and afterwards, on removing the judgment of the inferior court to a higher court by a writ of error, claims the privilege, such an omission is not a waiver of the privilege. It is also held in the same case, that the privilege of being sued only in the courts of the United States, is *not* a personal privilege of the consul, which he may waive at his pleasure, but that it is the privilege of the country or government which the consul represents. See also *Davis* v. *Packard*, 6 Peters, 41; *Ingersoll* J., in *Hart* v. *Granger*, 1 Connect. R. 169.

[3] But see *Davis* v. *Packard*, 7 Peters, 276; *S. C.* 6 Peters, 41. In *Latham* v. *Edgerton*, 9 Cowen, 227, it is said, that the want of jurisdiction is a matter that may always be set up against a judgment, when sought to be enforced, or where any benefit is claimed under it. The want of jurisdiction makes it utterly void and unavailable for any purpose. *Borden* v. *Fitch*, 15 Johns. R. 141; *Mills* v. *Martin*, 19 Johns. R. 33; *Smith* v. *Elder*, 3 Johns. R. 105; *Coffin* v. *Tracy*, 3 Caines's R. 129.

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SAMUEL CABOT *et al. versus* THOMAS HASKINS *et al.*

A promise to three, upon a consideration proceeding from them and a fourth person will support an action brought by the three.

Assuming a mere ideal danger which has no foundation in fact or in law, is not a valid consideration for a promise. Thus, where a person supposed himself liable to the United States, when by law he was not, on account of property assigned to him by a debtor of the United States, and upon restoring the property to the debtor assumed the risk of his liability, the debtor promising to pay him a sum of money therefor, it was *held*, that there was no possibility of loss, in a legal sense, to the assignee, and that the promise was without consideration.

The clause in *St.* 1788, *c.* 16,[1] (of frauds,) requiring a memorandum &c. in writing, applies to a mere promise by one to pay money to another, as well as to a mutual agreement where each party stipulates to do something.

At the foot of a mortgage deed, which was not accompanied by any note or bond, and which proved, owing to a prior mortgage, to be of no value, a memorandum was written, with the assent of the mortgagers, by the attorney of both parties, and signed by the mortgagees only, stating that the sum due on the mortgage was reduced to 1000 dollars, payable in five years. It was *held*, that the signature of the mortgagers to the deed could not relate to the memorandum, and that this was not a writing signed, &c., within the statute of frauds, sufficient to charge them for the 1000 dollars.

ASSUMPSIT to recover the sum of 1000 dollars, with interest from the 10th of December, 1818.

At the trial it appeared that the defendants, being in failing circumstances, on the 26th of February, 1817, assigned all their property, real and personal, to the plaintiffs and W. Lovering junior, in trust, in the first place, to pay all bonds and debts owing from the defendants to the United States, and afterwards to pay other creditors in proportion to their respective debts, in case the property should be insufficient to pay the whole of such debts. This assignment was cancelled on the 25th of April, 1817, and a verbal agreement was then made, by which the assignees were still to hold the personal property in trust for the payment of the defendant's debts, exclusive of those due to the United States, and at the same time a deed of mortgage, unaccompanied with any note or bond, was executed and delivered to the assignees, conveying certain real estate in fee, and conditioned to be void on payment of 20,000 dollars in one year. In consideration of the premises the assignees,

[1] Revised Stat. *c.* 74, § 1.

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under a letter of attorney from the creditors, on the same day executed and delivered to the defendants a release under seal of all demands by them represented. Three lots of land were purposely left unincumbered by the mortgage, in order that they might be conveyed to the United States; and lest the United States should not receive them in full satisfaction of their debt, it was agreed in writing, on the 21st of April, 1817, by the creditors who executed the letter of attorney, that their attorneys might retain so much of the property placed in their hands as should be sufficient to indemnify themselves against any claim of the United States. The three lots mentioned were conveyed by the defendants to the United States in December, 1817, in part satisfaction of their debt, leaving a balance of about 10,000 dollars unpaid.

On the 4th of June, 1818, the defendants submitted to the attorneys a proposal, in writing, to pay them, in six months from that date, a sum of money, as a final settlement, amounting to 43 per cent. of the demands which they held, together with 700 dollars as a compensation to the attorneys for their time and labor in the business, and to receive back all the property transferred to them. This proposal was accepted in the manner hereafter mentioned, and on the 10th of December, 1818, the attorneys received the stipulated sum, and released to the defendants all the property, excepting a parcel of land in Essex street included in the deed of mortgage, and at the same time signed a memorandum, written by W. Minot, the attorney of both parties, at the foot of the deed, acknowledging that the sum due thereon was reduced by settlement to 1000 dollars, to be paid in five years with interest, and promising not to sue or take possession under the mortgage within that period. The deed with this memorandum remained in the possession of the plaintiffs; but a paper of similar import, signed by the plaintiffs, was delivered to the defendants. The land in Essex street was subject to a prior mortgage for about 14,000 dollars, and the prior mortgagee had entered and foreclosed within the five years mentioned in the memorandum. The defendants owned only an undivided moiety of that land, and in sundry estimates given by them to the plaintiffs the moiety was stated to be subject to a mortgage for about 8000 dollars, instead of 14,000,

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they supposing that as they owned only half of the land, their interest in it would be liable for only half of the mortgage debt.

Lovering testified that the attorneys at first declined acceding to the proposal of the 4th of June, 1818; that the defendants offered them 1000 dollars if they would accept it; that the witness still declined, but the plaintiffs were willing to accept on those terms; whereupon the defendants promised to pay them 1000 dollars with interest, in five years after the contemplated settlement, and to give them collateral security on real estate; that the ground of refusal on the part of the attorneys was, that in their opinion the property released would be insufficient to raise the 43 per cent. and pay the United States besides, in which case they supposed the United States might call upon them to make up the deficiency; that the 1000 dollars was intended as an estimate of this risk, and to indemnify the plaintiffs, not only for any liability on that account, but also for any trouble or expense to which they might be put in resisting the claims of the United States, if any should arise; that it was agreed that Cabot, one of the plaintiffs, should indemnify the witness against all such liability, receiving his share of the 1000 dollars; in consideration of which the witness withdrew his objection, and signed the written proposal, in testimony of its acceptance; and that the promise to pay the 1000 dollars, being made to the plaintiffs, was not inserted therein, because the promise contained in that paper was a promise to himself jointly with the plaintiffs.

He further testified, that the memorandum of the 10th of December, 1818, at the foot of the mortgage deed, was made in pursuance of the verbal agreement of the 4th of June, and was intended to make the deed operate as the promised collateral security for the 1000 dollars; and that in order to give it that effect, the attorneys, on the same 10th day of December, released all the property transferred to them, except the land in Essex street, and the witness assigned to Cabot all his remaining interest in the mortgage, for the nominal consideration of
86 250 dollars and a written obligation to indemnify him against the United States, and that the attorneys at the same time received from the defendants the sum agreed on, which (excepting the 700 dollars) they afterwards distributed among the creditors, re-

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quiring each creditor at the time of payment to execute a bond of indemnity to the plaintiffs against all claims of the United States.

The jury returned a general verdict for the plaintiffs, on the ground, as they stated, that the consideration for the promise was as well an expected benefit to the defendants by the release of the property assigned, as the risk assumed by the plaintiffs.

March 8th and 9th.

Minot for the defendants. The consideration for the defendants' promise moved from Lovering, as well as from the plaintiffs, he being equally liable with them to the United States, and as he is not joined in the action, the plaintiffs must be nonsuited. This objection was taken before the verdict.

But, in truth, the plaintiffs were not liable to the United States, and so they assumed no risk; the consideration therefore was void. *Bartlett* v. *Prince*, 9 Mass. R. 431; *S. C.* 8 Cranch, 431; *M'Lean* v. *Rankin*, 3 Johns. R. 369.

The promise was not to be performed within one year, and there was no memorandum of it in writing signed by the defendants. It was therefore void by the statute of frauds. *St.* 1788, *c.* 16, § 1. There was no fraud, nor part-performance, to take it out of the statute; and in a court of law part-performance would not be sufficient for that purpose; neither was it to be performed within a year upon the happening of any contingency. *Anon.* 1 Salk. 280; *Fenton* v. *Emblers*, 1 W. Bl. 353; *Peter* v. *Compton*, Holt, 326; *Montacute* v. *Maxwell*, 1 P. Wms. 620; *Jackson* v. *Pierce*, 2 Johns. R. 223; *Boyd* v. *Stone*, 11 Mass. R. 342; *Kidder* v. *Hunt*, 1 Pick. 331. The memorandum on the mortgage was no promise by the defendants, nor was it signed by them; and parol evidence is inadmissible, either to show that the deed and memorandum mean differently from what they purport, or to vary the written contract of June 4, 1818.

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W. H. Gardiner for the plaintiffs. The objection that the consideration of the defendants' promise proceeded in part from Lovering, cannot be sustained. Lawes on Assumpsit, 56, cites *Curtis* v. *Collingwood*, 1 Vent. 297. The plaintiffs alone might have discharged the mortgage upon the records. *St.* 1783, *c.* 37; *Appleton* v. *Boyd*, 7 Mass. R. 131; *Richardson* v. *Goodwin*, 11 Mass. R. 472.

Parol evidence was admissible to show the contract declared

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on, because it was wholly collateral to the written agreement of the 4th of June, 1818, and between different parties. *Davenport v. Mason*, 15 Mass. R. 90.

Granting that the plaintiffs were not liable to the United States, the jury have found two considerations for the defendants' promise; and it is sufficient that one of them was a valid consideration, the other not being illegal. Lawes, 60. A possibility of benefit to the defendants, or of detriment to the plaintiffs, will sustain a promise. Lawes, 57; 1 Wms's Saund. 211 *b*, note; *Miller* v. *Drake*, 1 Caines's R. 46.

The contract was not void by *St.* 1788, *c.* 16, § 1, (29 *Car.* 2, *c.* 2,) of frauds. An agreement implies mutual promises; so that an agreement "not to be performed within a year," must mean one of which neither part is to be performed within that time; and justice requires this construction. Otherwise, if one party is to do a thing within a year, and the other an equivalent after the year, the former may perform his part of the contract, while the latter, not being bound to perform *his* part, may refuse to do it, and nevertheless enjoy all the benefit of the contract. Here the defendants were to pay the plaintiffs a sum of money after a year, and the plaintiffs to release property to the defendants within the year.

If this contract was originally within the statute, it is taken out by part-performance, the plaintiffs having done all, and the defendants only a part, of what they respectively undertook to do. *Earl of Aylesford's case*, 2 Str. 783; *Lacon* v. *Mertins*, 3 Atk. 1; *Owen* v. *Davies*, 1 Ves. sen. 82; *Buckmaster* v *Harrop*, 13 Ves. jun. 474; *Morphett* v. *Jones*, 1 Swanst 172; *Davenport* v. *Mason*, 15 Mass. R. 85; *Wilkinson* v *Scott*, 17 Mass. R. 249.

88 But there was a sufficient memorandum in writing signed by the party to be charged. For the mortgage deed acknowledges the receipt of 20,000 dollars, and is evidence of a promise to pay that sum. A mortgage is a pledge for the payment of a loan; it is a mere incident to the debt; 2 Cruise's Dig. 86, 87, 89, 123; and the mortgager is personally liable, if the pledge is insufficient, although there be no bond or note, or other evidence of promise, accompanying the deed of mortgage. *Cope* v. *Cope*, 2 Salk. 449; *Balsh* v. *Hyam*, 2 P. Wms

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455; *Howell* v. *Price*, 1 P. Wms. 291; *King* v. *King*, 3 P. Wms. 358. Now if a mortgage deed is *per se* evidence of debt, then the defendant's deed was a note or memorandum in writing of a promise to pay 20,000 dollars, signed by the party to be charged; and the subsequent memorandum, signed by the mortgagees, at the foot of the deed, only shows that the debt was then reduced to 1000 dollars. But supposing that the deed was in fact merely a conditional sale of land, and not intended to imply a promise to pay money originally, yet it was by its construction capable of operating as a technical mortgage, if the parties pleased, and by the agreement of the 10th of December, 1818, it actually became security for a debt of 1000 dollars, and of course *then* became, in connexion with the written memorandum of that date, a note in writing of a promise to pay that sum. For a mortgage may be made to operate as security for subsequent and future loans, if the parties so intend; and though the promise secured be only verbal, yet the promisee may waive the security and sue upon the contract, as much as if it were a note or bond. *Sherburn* v. *Fuller*, 5 Mass. R. 137; *Hills* v. *Eliot*, 12 Mass. R. 33. The parties clearly *intended* to make the existing mortgage deed security for the subsequent promise to pay 1000 dollars; and with this intention their attorney, in the presence of the defendants, and by their direction, wrote the memorandum of December 10, 1818, immediately *under their signatures* to the deed. Now it is no matter *where* the name of the party to be charged appears, if on a paper containing the terms of the agreement and written with intent to authenticate it. *Knight* v. *Crockford*, 1 Esp. R. 190; *Coles* v. *Trecothick*, 9 Ves 248; *Ogilvie* v. *Foljambe*, 3 Meriv. 53; *Penniman* v. *Hartshorn*, 13 Mass. R. 87. It is equally immaterial *when* the name is written, whether contemporaneously with the agreement, or before, or after it, if written with such intent. Upon this principle printed names at the head of a bill of parcels are held equivalent to written ones; the printing being an authenticated copy of the original writing, to which it relates. *Saunderson* v. *Jackson*, 2 Bos. & Pul. 238; *Schneider* v. *Norris*, 2 Maule & Selw. 286. And if the party to be charged suffer his signature to remain on a paper the terms of which have been altered, intend-

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ing to authenticate the new contract, it is surely the same thing as if he wrote it anew. The counterpart of the memorandum of December, 10, 1818, made at the same time, and delivered to the defendants, being signed by their attorney in the words, "witness W. Minot," is a sufficient note to charge the defend ants, though it might not have been so intended. *Coles* v. *Trecothick*, 9 Ves. 234. And the indorsement upon it by the defendants, of the words, "receipt for 19,000 dollars," is an admission that 20,000 dollars were due upon the mortgage deed to which it refers, of which sum only 19,000 dollars were paid. It is true that the mortgage deed, being made to Lovering and the plaintiffs jointly, and the memorandum of December 10, 1818, being signed by them, would seem to be evidence of a promise to pay the four, and not the three who now sue. But distinct papers relating to the same subject will be connected to make a memorandum within the statute, although no one of them be sufficient by itself. *Saunderson* v. *Jackson*, 2 Bos. & Pul. 238; *Allen* v. *Bennett*, 3 Taunt. 169; *Jackson* v. *Lowe*, 1 Bingh. 9. So all papers executed at the same time, and as parts of the same agreement, will be taken together to make the memorandum of it relate to the proper parties; and Lovering's assignment of his interest to Cabot, made contemporaneously with the memorandum of December 10, 1818, being connected with the deed and memorandum, and with the counterpart of the latter, which was delivered to the defendants, if competent to constitute a written memorandum of an agreement within the meaning of the statute, must be a memor-

90 andum of an agreement to pay the plaintiffs only and not the plaintiffs and Lovering jointly. And the oral testimony only corroborates the legal effect of the writings. Upon such memoranda as these the mischief of the statute is avoided. There is no danger either of fraud or perjury. The failure of the collateral security by the foreclosure of the prior mortgage, coupled with the defendants' misrepresentations of the value of their interest in the estate, would be sufficient ground, in equity at least, to take the case out of the statute. *Maxwell* v. *Montacute*, Pre. Ch. 526; *Joynes* v. *Statham*, 3 Atk. 388. If the plaintiffs could have got possession of the defendants' moiety by paying 8000 dollars, as was represented, they would

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nave done so ; but 14,000 dollars was more than the defendants' interest was worth.

S *Hubbard* replied.

Gardiner, being afterwards called upon for a further argument respecting the consideration for the defendants' promise, now contended, that it was impossible in this case to separate the risk to be incurred in doing a certain act, from the act itself, namely, restoring their property to the defendants. The plaintiffs agreed to restore the property and take all resulting hazards, only in consideration of the defendants' promise to pay them 1000 dollars for so doing. The act put them in a worse, and the defendants in a better situation. But the risk assumed by the plaintiffs was alone a sufficient consideration. They exchanged a certainty for an uncertainty. It is said they ran no risk, because by law they could not be liable to the United States. Admitting the law to be so, they could not know it. They had been assignees of all the property of the defendants, who were insolvent, under a sealed instrument, by which they were first to pay the debt of the United States. This seemed to be within the act of 5 *Cong.* 1 *Sess. c.* 128, § 65. That instrument was afterwards cancelled merely to avoid their obligation to pay the United States ; but whether the cancelling would have that effect, after they had assumed the trust, was a matter for judicial construction. *Riches* v. *Briggs*, Yelv. (Metcalf's ed.) 4 *a* ; *Brand* v. *Lisley*, ibid. 164 ; *Weston* v. *Barker*, 12 Johns. R. 278. There had been no decided case in which the circumstances were precisely similar. See *Bartlett* v. *Prince*, 9 Mass. R. 438 ; *S. C.* 8 Cranch, 434 ; *United States* v. *Hooe*, 3 Cranch, 90 ; *Thelusson* v. *Smith*, 2 Wheat 425 ; *Watson* v. *Todd*, 5 Mass. R. 175 ; *Otis* v. *Warren*, 16 Mass. R. 56. These cases contemplate something which may be a notorious insolvency, even where there are no state insolvent laws. An assignment of *all* a debtor's property to pay his debts, is evidence of such insolvency at common law. The United States' Attorney might at least have thought the experiment of an action worth trying, and have subjected the plaintiffs to great expense in defending against it. To say that there was no risk supposes the theoretic certainty of the law to exist in fact. But Lord *Mansfield* thought otherwise when he

March 18*th*.

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held, that the event of an appeal upon a matter of law was a sufficient hazard to support a wager. *Jones* v. *Randall*, 1 Cowp. 39, 40. It is enough that the parties thought there was a risk. *Earl of March* v. *Pigot*, 5 Burr. 2802. They have estimated the risk and made a contract of insurance respecting it; which is not illegal, because it is neither *malum in se*, nor prohibited, and not frivolous, because the parties had an interest. *Lord* v. *Dall*, 12 Mass. R. 115. This contract was known to the other creditors, so that there was no fraud in taking a bond of indemnity against any claims of the United States; besides, the bond would not have covered counsel fees.

S. Hubbard in reply. The law is a science reduced to certain rules, and not like a lottery. It was settled, that the priority of the United States in cases of insolvency has no operation where a state has no insolvent law; so that the plaintiffs assumed no legal risk. An action could not have been brought against them with the least probability of success. The first assignment, upon being cancelled, ceased to have any operation. *M'Lean* v. *Rankin*, 3 Johns. R. 369. If the United States had received an order upon the assignees and given them notice of it before the assignment was cancelled, the case of *Weston* v. *Barker* might apply.

Jan. 14th, 1826.

PARKER C. J. delivered the opinion of the Court. The first objection stated to the verdict in this case is, that admitting the promise, as declared on, to be proved, yet it appears that the consideration moved as well from Lovering, who was no party to the promise or to the action, as from the three plaintiffs, and therefore that the action cannot be maintained; but, we think it immaterial from whom the consideration, if it be a sufficient foundation for a valid promise, passed. We think there is no doubt, if A advances money to B, who in consideration thereof at A's request promises to pay C, that C may maintain an action upon this promise. See the opinion of *Eyre* C. J. and the whole court in the case of the *Company of Feltmakers* v. *Davis*, and of *Buller* J. in the case of *Marchington* v. *Vernon* cited in a note to that case, and of this Court in the case of *Felton* v. *Dickerson*, 10 Mass. R. 287.[1]

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[1] But an indebtment to three jointly is not a sufficient consideration to

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With respect to the consideration of the promise there has been more difficulty in deciding. This consideration is proved by the testimony of William Lovering, and is in substance this, that the defendants, whose property was in the hands of the plaintiffs and Lovering for the purpose of raising money for distribution among the creditors of the defendants, proposed to the plaintiffs, who were agents and attorneys for the creditors, to pay in a short day a sum sufficient to discharge 43 per cent. of the debts, and 700 dollars to the attorneys fo. their trouble, provided the plaintiffs would surrender to them the property which they held and would discharge them from their debts; that the plaintiffs declined, on account of their supposed liability to the United States for the debts of the defendants because of the property in their hands; and that to avoid this objection the defendants promised to pay the plaintiffs 1000 dollars as and for an indemnity for the risk which they ran upon this account, which risk the plaintiffs were to take upon themselves; and this proposition was accepted.

This promise was made upon a supposition or belief that the United States had a priority of lien upon the property of the defendants, in consequence of their declared inability to pay their debts and of the assignment of their property to the plaintiffs. If they were mistaken in this supposition and the United States had no such claim, there would be no real, but only an 93
apparent consideration for the promise, and it would consist neither with law nor equity that the payment of this sum should be exacted.

Now it seems to be clearly settled by this Court in the case of *Prince* v. *Bartlett*, 9 Mass. R. 431, by the Supreme Court of New York in *M'Lean* v. *Rankin*, 3 Johns. R. 369, and by the Supreme Court of the United States in 8 Cranch, 431, where there was a revision of the same case of *Prince* v. *Bartlett*, that the United States have no priority in a case like this, because there was no bankruptcy and no insolvency, in the sense intended by Congress in the act whereby the priority of the United States is established.[1] There seems to be then no

support a promise to one separately for his portion of the debt, either express or implied. *Vadakin* v. *Soper*, 1 Aiken, 287.

[1] *Watkins* v. *Otis*, 2 Peck. (2nd ed.) 102, note 1

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valuable consideration for this promise to stand upon, and the money, if paid, would be paid for nothing.

We cannot suppose that a mere ideal danger, which has no foundation in fact or in law, can form the substratum of a contract by which the one who assumes it can claim indemnity. Even in the contract of insurance there must be some risk to entitle a party to the premium, and if it turns out that there was none, although some may have been supposed at the time when the contract was made, the premium cannot be recovered.

There must be as a legal foundation for a promise, either an actual damage, or a suspension or forbearance of right, or a possibility of loss occasioned to the one to whom the promise is made, to give it validity. It is not material that any actual benefit should accrue to the party undertaking. *Vide* 1 Wms's Saund. 211, note 2; 2 Wms's Saund. 137, note 2. Here was no damage, nor any forbearance or suspension of right, nor any possibility of loss in the legal sense of that phrase, for it had long before been decided by the ultimate authority that the United States had no claim.[2]

It has been urged by counsel, that the sum promised was part of the consideration for giving up the goods, or at least was a compensation to the plaintiffs for their trouble and responsibility; but this latter was compensated for by the 700 dollars which were stipulated to be given; and with respect to the former, if it was the consideration for giving up the goods, it should seem to belong to the general fund for distribution among the creditors, whereas it was intended for, and is now claimed by, the plaintiffs to their own use. Indeed the testimony of Lovering puts this in a clear light, for he states, that this 1000 dollars was an indemnity only for the supposed liability of the four agents, of whom he was one, and it was so treated by them, for he assigned over his quarter part upon an indemnity against this liability. We are bound to consider this the only consideration, and for the reasons given, it is insufficient.

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It is true that the jury stated it as their belief, that the promise was made, as well on account of the benefit expected by the defendants, as for the risk assumed by the plaintiffs, but

[2] *Hunt* v. *Swain*, 1 Lev. 165; *Jones* v. *Ashburnham*, 4 East, 455; *Tooley* v *Windham* Cro. Eliz. 206; *Lent* v. *Padelford*, 10 Mass. R. 236.

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there is no evidence from which they could legally infer that this expected benefit made part of the actual consideration. It was without doubt a motive or inducement to them to yield to the claims of the other party, but was not the consideration, in a legal point of view, of the promise. A man may have motives of self-convenience to promise to pay the debt of another, but yet without a legal consideration such a promise would be void.

Such being our opinion upon this point, we might be relieved from the necessity of considering the application of the statute of frauds, in relation to which much argument and ingenuity have been exhibited. This promise was to be performed only at the end of five years from the time when it was made; so that, if it be within the words or the clear meaning of the statute, and it be not in writing, no action can be sustained on it. It was argued that the statute intended only mutual agreements, in which both parties stipulate to do something, and not a mere promise by one to pay money to another; but we do not find that such a construction has ever been given to the statute; nor would such a construction comport with the obvious intent of the legislature, which was to require written proof of contracts to be performed in future, in order that the uncertainties resulting from verbal testimony might be avoided.

It was urged also, that the plaintiffs were to deliver the goods within six months, and that where there is a mutual agreement, and either party is to perform in less than a year, the contract 95
is not within the statute.[1] This proceeds upon the hypothesis that the delivery of the goods made a part of the consideration for this promise, which we have before seen is not the case. We consider this contract respecting the 1000 dollars as wholly independent of the compromise. The latter was made for the benefit of the creditors, the former for the benefit of the plaintiffs alone. They seem to be wholly independent of each other.

Nor is the promise in writing within the terms of the statute. It must not only be in writing, but it must be signed by the party to be charged. It is true that much liberality has been used in regard to this requisition of the statute, so that if the

[1] See per *Lord Ellenborough*, 11 East, 152; per *Abbott* J., 1 Barn. & Ald. 727

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name of the party appears on the instrument, written by himself, though not signed, in the common understanding of that term, it has yet been held sufficient. But the memorandum at the foot of the mortgage is the declaration or acknowledgment of the plaintiffs, not of the defendants; their name is nowhere written by themselves, so that it would certainly be an unwarrantable stretching of the statute, to call that memorandum a writing signed by the defendants who are to be charged.

As to the suggestion, that the agreement has been partly performed and so ought on principles of equity to be enforced,[2] that depends again upon the question, whether the agreement to deliver the goods formed the consideration of the promise to pay the money, and upon this we have given our opinion.

We see no evidence of fraud on the part of the defendants in relation to the incumbrance on the mortgaged estate; they might honestly suppose that only one half of the debt attached to the moiety of the premises conveyed by them; and if there were fraud in this particular, we do not see how that can supply the want of those formalities which the law requires to substantiate a promise, which by the terms of it is not to be executed until more than a year has elapsed from the time of making it.

Verdict set aside.

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[2] The provisions of this statute render a parol contract void, if it appear to have been the understanding of the parties at the time, that it was not to be completed within a year, although it might be, and was in fact, in part performed within that period. *Boydell* v. *Drummond*, 11 East, 142; *Bracegirdle* v. *Heald*, 1 Barn. & Ald. 722; *Squire* v. *Whipple*, 1 Vermont R. 69; Chitty's Contr. (3d Amer. edit.) 207, 208; *Lower* v. *Winters*, 7 Cowen, 263; *Snelling* v. *Huntingfield*, 1 Crompt. Mees. & Roscoe, 20; *S. C.* 4 Tyr. Exch. R. 606.

The statute of frauds has no application to a contract, that has been fully performed on both sides. *Stone* v. *Dennison*, 13 Pick. 1.

Whether a part-performance is ever an answer to the statute, except in courts of equity, *quære*. *Squire* v. *Whipple*, 1 Vermont R. 69. See *Stone* v. *Dennison*, 13 Pick. 1; *Bates* v. *Moore*, 2 Bailey, 614. But where a contract within the statute of frauds has been in part executed by one party, there is a plain remedy for such party to a certain extent, in a court of law, if the other party fraudulently refuses to execute the contract on his part. If money has been paid, it may be recovered back. If labor has been performed a compensation for it may be recovered. *Lane* v. *Shackford*, 5 N. Hamp. R. 133; *Holbrook* v. *Armstrong*, 1 Fairfield, 31; *Kidder* v. *Hunt*, 1 Pick. 328; *Little* v. *Martin*, 3 Wendell, 219; *Shute* v. *Dorr*, 5 Wendell, 204; *Burlingame*

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The President &c. of the UNION BANK *versus* JOSIAH KNAPP.

In an action by a bank against a depositer for having overdrawn, the books of the bank are competent evidence to show receipts and payments of money.

If the clerk who made the entries is dead or insane, the book is admissible upon proving his handwriting.

A bank is bound to produce its books for the inspection of a depositer, upon proper occasions, and the officers of the bank having charge of them are so far the agents of both parties.

In an action by a bank against a depositer, who was supposed to have overdrawn in consequence of a mistake in the leger, the clerk who made the mistake said he did not know whether he was accountable or not, and that if the money should be lost he should remunerate the bank, if required. *Held*, that he was not liable to the bank, or at most only on a contingency, and that he was a competent witness on the part of the bank.

Where an account between merchants has been balanced, and a balance carried forward, it is no longer an open and running account, and the parties cannot go behind such settlement, without leave obtained upon a bill in chancery, to inquire whether the balance is founded in error.

Thus, the usage of a bank was, at the end of every month, to balance the bank book of a depositer and make the balance the first item in a new account, and to restore to the depositer the checks drawn by him during the month; and it was *held*, that the bank could not go behind any such settlement, and that the statute of limitations begins to run, as to any such balance, from the time of so stating the account.

ASSUMPSIT for money had and received. Pleas, the general issue and the statute of limitations.

The defendant had been accustomed to make deposits in the Union Bank, and this action was brought on the ground that the bank had by mistake credited him with 1000 dollars more than he had deposited, and that in consequence he had overdrawn to that amount.

At the trial the plaintiffs offered in evidence the leger and journal of the bank; which were objected to by the defendant

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v. *Burlingame*, 7 Cowen, 92; *Gary* v. *Hull*, 11 Johns. R. 441; *Donellan* v. *Read*, 3 Barn. & Adol. 899. Equity will relieve in cases of part-performance. *Marks* v. *Pell*, 1 Johns. Ch. R. 594; *Strong* v. *Stewart*, 4 Johns. Ch. R. 167; *Washburn* v. *Merrills*, 1 Day, 139; *Daniels* v. *Alvord*, 2 Root, 196; *Ross* v. *Nowell*, 1 Wash. 15; *Watkins* v. *Stockett*, 6 Harr. & M'Hen. 24; *Wilcox* v. *Morris*, 1 Murphey, 117; *Wilcox* v. *Carver*, 1 Haywood, 93; *Belton* v. *Avery*, 2 Root, 279, *Wheeland* v. *Swartz*, 1 Yeates, 579; *Mackey* v. *Brownfield*, 13 Serg. & Rawle, 239; *Crocker* v. *Higgins*, 7 Connect. R. 342.

An agreement to marry within five years, is within the statute. *Derby* v. *Phelps*, 2 N. Hamp. R. 515.

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as incompetent evidence, but the judge permitted them to go to the jury.

It appeared by the leger, that the items of cash put to the defendant's credit in the month of November, 1817, when correctly added, amounted to 1000 dollars less than the actual footing; and that the balance was so struck as to include this sum in that which was carried to his credit the ensuing month.

97 The leger contained entries of debt and credit every month after, until February, 1824, when the dealings between the bank and the defendant ceased, there being then a balance in his favor of 12 dollars, 24 cents, which was paid on his check, the cashier saying, that the defendant would do what was right. A balance was struck at the end of every month, and the above-mentioned sum of 1000 dollars was included and carried forward in every account. By the actual entries for February, 1818, the defendant overdrew, on the 18th of that month, 421 dollars and 13 cents. If he ought to have been charged with the 1000 dollars, the amount overdrawn would be increased, and the balance of the preceding month, and also of divers subsequent months, would be against him.

The journal contained similar items of charge and credit with the leger, except the footings at the end of each successive month; and it was stated by the plaintiffs, and not denied, that if the sums drawn out or charged on one side, and the deposits on the other, were respectively added, commencing on the 1st of November, 1817, they would show, on striking a balance at the end of January, 1824, that the sum of 988 dollars, 76 cents, had then been overdrawn.

The blotter kept by the receiving teller of the bank, and containing his entries of the deposits, was admitted in evidence, though objected against by the defendant. The person who kept this book was alleged to be insane, and his handwriting was therefore allowed to be proved by the testimony of Nathaniel Emmons. The entries in the blotter appeared to correspond with those in the journal, as it respects the items of credit given by the bank to the defendant.

In consequence of a notice upon the defendant to produce his deposit books (usually called *bank books*) he made affidavit, that he had searched for them, but that he was unable to find

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any except two, which he brought into court, commencing in 1823.

Chester Adams, a witness on the part of the plaintiffs, testified that he had been cashier of the bank since 1819; that in depositing money their method is, to have it pass into the hands of the receiving teller, who notes it on a blotter to the name and credit of the depositer. The second bookkeeper 98
transfers the entry from the blotter to the journal, and the first bookkeeper posts from the journal into the leger. The receiving teller has nothing to do with the journal. The money is examined by him and usually entered in the depositer's book, after being first entered in the blotter, but sometimes deposits are received when the depositer's book is not brought in. When money is drawn out, it is always done by a check. The paying teller receives the checks and keeps likewise a memorandum of the sums, but does not enter the names; this is done by the person who keeps the journal, directly from the checks. It is the rule to balance the accounts in the leger and depositer's book at the end of the month; the latter is written up by different persons, as it may happen. It is made up from the checks and original entries and compared with the leger, and is always corrected by the leger. The person who writes up the depositer's book generally foots it, but not always. The second bookkeeper does it sometimes, and then hands it to the first bookkeeper, whose business it is to foot up and balance the leger. It often happens that the books do not agree; but the bookkeeper corrects any error as soon as it is found. He holds the checks until the deposit book is balanced, and delivers up the checks with the book, if found right, but not otherwise. At the close of the day the receiving teller and journalist compare their books, and the cash of the receiving and paying tellers is compared with their books. The witness further testified, that it was customary with banks to take a trial-balance once a month, and that none had been correctly taken at this bank for some years, before he was made cashier; and he stated the manner in which the error in question had been discovered by means of the trial-balance.

Samuel Parker, also called by the plaintiffs, testified that he had been paying teller of the bank for more than ten years;

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that he made a memorandum of the checks paid by him in figures, without names, and footed the sums. He had no concern as to their being carried to the right person in the journal, which was done from the checks themselves. He never examined the journal, unless there was an error in the footing. At the end of each day he compared the foot of his items with the entries in the journal, and if any mistakes had occurred they were corrected.

Nathaniel Emmons, the clerk who made the mistake in question, was also called by the plaintiffs, and being asked whether he expected to gain or lose by the event of this suit, he said he did not know whether he was accountable to the bank or not; and that if this money should be lost, he would sell his house or anything else, if required by the bank. His competency was then objected to by the defendant, but the objection was overruled. The witness then testified that he had been first bookkeeper of the bank for thirty-two years; that he kept the leger, and that there was an error in it made by himself of 1000 dollars in the account of the defendant. He generally looked at the leger before striking the balance in a depositer's book. He sometimes compared the items and sometimes did not. He always looked at the balances and footings.

The journal of 1817 being offered, and it being stated that the person who kept it was deceased, Emmons was admitted to testify to his handwriting, although this was objected to on the part of the defendant.

Evidence was produced on the part of the defendant, to show that it was usual and necessary for banks to make a trial-balance often; that by that means any mistake would be discovered; that mistakes are sometimes made at the banks by crediting deposits to the wrong person; and that it was not the practice with the defendant or with other depositers to be careful of their old deposit books.

The jury found a verdict for the plaintiffs.

March 16th and 17th.

Prescott now contended that a new trial ought to be granted. The defendant has great reason to complain of the negligence of the bank in not sooner calling upon him to rectify the mistake which is supposed to have been made. If the bank had

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taken a trial-balance at the time, as they ought to have done, and had given the defendant notice of the apparent error in his account, he might then have ascertained by his deposit book, whether there was in fact such an error; but he has not preserved his book, thinking it of no use. It is incumbent on the plaintiffs to show the mistake clearly by legal and strict proof. 100

The books of the bank ought not to have been received in evidence, as they were not kept correctly nor in conformity to bank usage, not having been subjected periodically to the trial-balance; the omission of which is a proof of gross negligence. They were not testified to by the persons who made the original entries. The books of a bank are not entitled to more favor than those of merchants generally, nor indeed to so much. They are not made with a view to their being evidence against the person dealing with the bank. He has no access to them. The bank receives the money and gives credit for it upon the depositer's book, and pays it out upon his order. It appears that in November, 1817, the plaintiffs paid 1000 dollars more than was credited in the leger. They are bound to show that the leger contains all the sums that were received and paid out during that month. The deposit book is not a transcript from the leger, nor are the items in the two compared; *non constat* therefore that the error was carried into the deposit book. The defendant may have deposited the sum of 1000 dollars which has not been entered in the leger. Such an omission might be made by mistake or design. The receiving teller might have put the money into his own pocket. The deposit book is a book of original entries; the leger is but secondary evidence, even if it were proved to correspond with the deposit book. The checks were the legal evidence of the payments made by the bank; but they have been given up and the defendant had a right to consider the account as settled. The receiving teller sometimes makes his entries in the deposit book first, and sometimes in the blotter; as they are not always made first in the blotter, that book cannot be admitted in evidence. The journalist does not know that the checks from which he makes his entries have been paid; so that the journal cannot be legal evidence. The books are not proper evidence

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of the payment of large sums of money. Merchants' books are admitted by the usage of this State only in regard to sums not exceeding forty shillings. 1 Phil. Ev. 196; *Cooper* v. *Marsden*, 1 Esp. R. 1. It is true that one of the clerks is dead and another insane; but the defendant is not in consequence to be charged with a large sum of money merely by their entries in the plaintiffs' books. *Calvert* v. *Abp. of Canterbury*, 2 Esp. R. 646. The plaintiffs should have shown that the money remaining in the bank at the date of the error, was counted, to ascertain whether there was any actual deficiency in their funds.

The witness Emmons should have been excluded on the ground of interest, as he said he felt bound to indemnify the bank if it should be required of him.

In regard to the statute of limitations, the replication is that the defendant promised within six years. There was no evidence of any such promise or acknowledgment. The question whether the case comes within the exception of the statute relative to merchants' accounts, is not properly presented under the issue joined. But in fact the dealings of these parties were not like those between merchant and merchant. There was no buying and selling. We rely however on the point, that the accounts between these parties were mutually stated and settled, and the vouchers cancelled, more than six years before the commencement of this suit. The balance found due to the defendant became itself a new item. The plaintiffs cannot now go into an inquiry in what manner this balance was obtained. If they could, they might inquire into settlements made any number of years back, without any limitation. The exception as to merchants' accounts applies only to open and running accounts and not to accounts stated. *Webber* v. *Tivill*, 2 Wms's Saund. 127, note 6; *Catling* v. *Skoulding*, 6 T. R. 189; *Welford* v. *Liddel*, 2 Ves. sen. 400; *Barber* v. *Barber*, 18 Ves. jun. 286.

Loring, for the plaintiffs, contended, 1. That the bank books were proper evidence, from necessity, for the sake of trade and common usage of business. In all cases the best evidence which the nature of them admits, is, for that reason, legal evidence. Otherwise, men acting with ordinary care and

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discretion might suffer wrong without a remedy. This principle operates in numerous instances in contravention of the strict rules of evidence, upon the ground that the presumption of evil to arise from admitting the testimony which they would exclude, is counteracted by the presumption of the greater evil which would result from its rejection; it being evident that the modes of doing business generally acquiesced in, are those best suited to its successful and safe management, and that to exclude the only testimony which they admit of, would tend to embarrass trade. This principle is particularly applicable to the case at bar. It is evident that these books are the only evidence which the plaintiffs can have. The only vouchers ever existing were the checks drawn by the defendant, and the little book given to him; the former have all been delivered up to him according to the usage, and the latter is his and can be made evidence only by his consent. The plaintiffs have no other evidence of any payments; and if these books are not evidence, every bank in the commonwealth is at the mercy of every depositer who can prove by a servant or clerk the deposit of any money. These checks are given up to the depositer on the ground that they have been entered in the books, and that his deposit book is a counterpart of these books; so that he tacitly consents that the bank may substitute their books for evidence instead of those checks. The cases decided on this principle are very numerous, thus forming exceptions to the firmest rules of evidence. *Price* v. *Torrington*, 1 Salk. 285; *Welsh* v. *Barrett*, 15 Mass. R. 380; *Evans* v. *Lake*, Bull. N. P. 282; *Dixon* v. *Cooper*, 3 Wils. 40; *Benjamin* v. *Porteus*, 2 H. Bl. 590, *Wyndham* v. *Chetwynd*, 1 Burr. 422; *Martin* v. *Horrell*, 1 Str. 647; *Poultney* v. *Ross*, 1 Dallas, 239; *Curren* v. *Crawford*, 4 Serg. & Rawle, 3; *Vosburgh* v. *Thayer*, 12 Johns. R. 461; *Cogswell* v. *Dolliver*, 2 Mass. R. 217; *Herman* v. *Drinkwater*, 1 Greenl. 27. In all these cases evidence is admissible from necessity, which would otherwise be incompetent, and in some of them there might be great danger; but there can be none here; bank books are kept according to a uniform system, which has been gradually matured and is the best for the safety of all parties, which human ingenuity could

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devise, and by clerks selected for their skill and honesty and wholly disinterested.

2. That the clerks are agents of both parties. They make all the entries in depositers' books and those of the bank; they furnish each party with a set of accounts in books. We produce ours and call on the defendant to produce his. The whole system of banking is founded on the mutual advantage accruing to the bank and the depositers; neither pays the other any other price for the benefit enjoyed, and the clerks are paid from the profits arising from this mutual benefit; so that they are strictly speaking agents of both parties. There are no documents or vouchers which either party can produce, but what they furnish.

3. That the depositer's book is tantamount to a bill delivered The plaintiffs are bound to prove their payments only, and exhibit the account in their books, of which a counterpart was delivered to the defendant; for his deposit book is in part one of original entries made at the same time with those in the blotter, and as to the rest is copied from the journal and compared with that and the leger, and also with the checks before they are delivered up; so that it is given and received as a statement of the accounts between them, and, unless objected to, is evidence of an admission of them. 1 Phil. on Ev. (6th ed.) 252.

4. That bank books are in the nature of public records — concerning the public in general and kept or superintended by officers designated by law — and are therefore evidence. *Mann* v. *Carey*, 3 Salk. 155; *Marsh* v. *Collnett*, 2 Esp. R. 665; *Rex* v. *Mothersell*, 1 Str. 93.

If the books would be evidence in case the clerks who made the entries were called as witnesses, the death or insanity of the clerks is immaterial, provided their handwriting be proved. *Lewis* v. *Norton*, 1 Wash. 76; *Pritt* v. *Fairclough*, 3 Campb. 305; *Welsh* v. *Barrett*, 15 Mass. R. 380; *Kennedy* v. *Fairman*, 1 Hayw. 458; *Adam* v. *Rogers*, 1 Bay, 480.

The objection that books are not evidence of cash payments, applies only to tradesmen's books, whose ordinary dealings are not in cash. But in this case the only dealings be-

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tween the parties were in cash, and the only evidence of them is by books kept for their mutual benefit. Union Bank v. Knapp.

There is no force in the objection, that the person who makes the entries does not pay the money; the paying teller does make memoranda or entries on the blotter, and passes the check to the journalist, who makes the entry at large, and they afterwards compare their entries. The paying teller pays upon his knowledge of the depositer's signature, and the journalist has the same evidence; and the journal and blotter are compared, so that it is impossible to have a mistake in the teller's account, unless by fraud between him and the journalist. The security to the depositer is more than double what it would be if only one person paid and made the entries.

Emmons was a competent witness; he was not legally interested in the event of this suit. He could not be made responsible for an innocent mistake in the course of his employment; and a merely honorary obligation does not affect his credibility. *Union Bank* v. *Clossey*, 12 Johns. R. 271; *Pederson* v. *Stoffles*, 1 Campb. 144; Phil. on Ev. (6th ed.) 50, 51; *Gilpin* v. *Vincent*, 9 Johns. R. 219. But if interested, his interest was contingent, depending on the bank's requiring him to make good the loss, and therefore did not disqualify him. To exclude a witness, the interest must be certain, or the verdict must be capable of being used in a subsequent suit against the witness. *Stockham* v. *Jones*, 10 Johns. R. 21; *Case* v. *Reeve*, 14 Johns. R. 79; *Rex* v. *Cole*, Peake's Cas. 217; *Rex* v. *Teasdale*, 3 Esp. R. 68; *Newland's Case*, 1 Leach, 353. If these grounds fail us, we contend that he was an admissible witness from necessity, within the rule before stated. He was not more interested than a factor or a person swearing to his own books; and his testimony was essential, for no other witness could testify to the comparing of the deposit book with the leger.

As to the objection that this mistake in the leger does not prove a corresponding one in the deposit book, the answer is, that the books being admitted raise that presumption, and of the strength of it the jury were the sole judges. There must have 105
been a similar mistake in the deposit book; or the defendant must have been there credited with the sum of 1000 dollars

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which has not been credited to him in any other book The plaintiffs do not rely upon the leger to prove the over payment. they show the books of original entries which prove it; the leger is introduced merely to show how the mistake was made, and that a similar one existed in the defendant's deposit book, as the balances in them could not otherwise agree. Taking the number of depositers, the different sums deposited, &c., into consideration, it would be easy to show that the presumptions are almost infinite in favor of the belief, that the same mistake was made in the defendant's book.

In regard to the statute of limitations, we rely on the point that this is an open account. Every new item of credit is an admission of an unsettled account between the parties. *Catling* v. *Skoulding*, 6 T. R. 189. Where a balance is stated and carried forward, it makes an open account from the beginning. *Farrington* v. *Lee*, 1 Mod. 270; *S. C.* 2 Mod. 312; *Cogswell* v. *Dolliver*, 2 Mass. R. 217. It is said that the balance becomes an item in the new account. But this item is something to be proved, and it is necessary to inquire into the former accounts to see whether it is due.

S. Hubbard, on the same side, added that this action did not accrue until a demand was made upon the defendants. *Topham* v. *Braddick*, 1 Taunt. 572; *Clark* v. *Moody*, 17 Mass. R. 145. It is said that the books were not intended to be used as evidence, but if so, the checks would not have been given up. The Court have settled, that persons dealing with banks are bound by their usages.

Prescott in reply. The cases which have been cited do not show that entries in books have ever been admitted to prove such large charges of cash as those now in question. In *Price* v. *Torrington* the man who made the entries charged himself, and so they were admitted in evidence.

The bank clerks are nowise the agents of the depositers, and it would be impertinent in a depositer to ask to inspect the bank
106 books. It was the duty of Emmons to compare the deposit book with the leger and to take a trial-balance. Having neglected to do so, he was liable to the bank; and though he might not be guilty of a breach of trust, so as to make his bondsmen answerable, still he would be bound to indemnify the bank for

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a loss occasioned by his mistake. If he felt that he had an interest in the event of the suit, he was disqualified to be a witness. *Plumb* v. *Whiting*, 4 Mass. R. 518. The bank ought to have given him a release. It is said that when accounts are balanced and a balance carried forward, the parties may go back beyond six years and investigate in what manner the balance was made up; but that would be a mischief which the statute intended to remedy. This is the common case of money paid by mistake, and no demand was necessary to give a cause of action.

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PUTNAM J. delivered the opinion of the Court. We are in the first place to consider, whether the books of the bank were competent evidence.

Jan. 14th, 1826.

It was said by Lord *Kenyon*, in *Cooper* v. *Marsden*, 1 Esp. R. 1, "That the rule of evidence was clear, that entries in the books of bankers or persons keeping books respecting their trade or business, *could only be proved* by the clerks who had made the entries;" and he rejected evidence of the handwriting of the clerk, who was in India.

It seems to have been taken for granted, in that case, that the books of bankers were to be received in evidence, if properly proved. No other objection was made, but that the clerk who made the entries was not in court to prove them. It was not suggested, that if he had been present and had proved them, the books would not have been competent evidence.

We think the remark, that such books could *only be proved* by the clerk who made the entries, requires some qualification. If, for example, he had deceased, it seems very clear from the cases cited by the plaintiffs' counsel, that proof of his handwriting would have been admitted; and the same judge, in *Digby* v. *Stedman et al.*, 1 Esp. R. 328, admitted the book of a watchmaker, which was in *his own* handwriting, as competent evidence in corroboration of the testimony of his servant, who testified to the delivery of a watch charged in the book. In the case cited, of *Cooper* v. *Marsden*, the testimony of the clerk might have been obtained. He was living, although beyond seas. In Pennsylvania, proof of the handwriting would be admitted, if the clerk were dead or out of the jurisdiction of the court. *Sterrett* v. *Bull*, 1 Binn. 237.

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Many cases are to be found, where the entries of servants, stewards, and attorneys, in the books of their principals, or in books kept by and for themselves, have been admitted as evidence after their decease. Thus in *Doe* v. *Robson*, 15 East, 32, where the point in controversy was, when a certain lease was delivered, the charge of the attorney, who had deceased, was admitted, to prove that it could not have been written when it bore date.

In *Lewis* v. *Norton*, 1 Wash. 76, it is laid down as a general proposition, that "ever since the decision in *Lord Torrington's case*, the law has been settled, that a book of accounts in the handwriting of, and kept by, a clerk who is since dead, is proper evidence upon those facts being proved."

The case cited by the plaintiffs' counsel, of the *Assignees of Sir Stephen Evans* v. *Lake*, Bull. N. P. 282, is strong to this point. The question was, whether eight shares which Lake had purchased in his own name, were in truth for the account of Evans. Six of the receipts were in the hands of Evans, upon which his bookkeeper, who was proved to be dead, had made memoranda referring to the book of Evans, wherein was a charge of the payment of the money by Evans. The book was admitted not merely as to the six, but likewise as to the two which were in the hands of Lake's son.

So a memorandum upon a paper purporting to be a copy of a license, made by a merchant's clerk who was deceased, was admitted as evidence tending to prove that he had sent the original, according to his usual manner of transacting the business. *Hagedorn* v. *Reid*, 3 Campb. 379.

So the entries of a steward, who had afterwards deceased, of sums paid by trespassers, were held competent evidence in a cause relating to the title of his master. *Barry* v. *Bebbington*, 4 T. R. 514.

108 The case in our own books, of *Welsh* v. *Barrett*, 15 Mass. R. 380, is to the same point. There the memoranda of a messenger of a bank who had deceased, was admitted as tending to prove notice to indorsers.[1]

[1] The doctrine, that entries made in the usual course of business, by one who had no interest to falsify, should be received in evidence after his death, seems to be regarded by Starkie, (1 Stark Ev. 5th Amer. ed. 298 to 302,) as

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And there is a peculiar reason in the case at bar, why the books of the bank should be given in evidence, for the bank furnishes transcripts of them to its depositers; which in effect operate as the mutual acknowledgment of the parties as to their money dealings. In this respect it is like the case of *Wiltzie* v. *Adamson*, where Lord *Kenyon* admitted in evidence a book kept by servants at an inn, for articles, delivered to a club, it appearing that the members of the club had access to the book. 1 Phil. on Ev. (6th ed.) 252. And we are of opinion, that the books are to be open for the several depositers, and that the bank is bound to produce them on all proper occasions.[2] The officers of the bank having the charge of the books, are to be so far considered as agents for both parties.

But it is objected, that Nathaniel Emmons was not a competent witness to prove the entries made by him in the leger which he kept, on account of interest. In answer to the question, whether he expected to gain or lose by the event of the suit, he said, "that he did not know whether he was accountable or not, and if this money should be lost he would sell his house or any thing else, if required by the bank." He said, "the error was of his making." If it was error only, and not a breach of trust, he would not be liable for it. *President &c.*

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the correct doctrine, on principle. He, however, considers it not clearly settled by the cases, whether, in addition to the absence of all interest to falsify, there should not also be an interest not to falsify, in the party making the entries. See also 1 Phil. Ev. (7th Lond. ed.) *p.* 260, 262, 263, and the cases cited in the notes; *Barker* v. *Ray*, 2 Russell's Ch. R. 67, and the cases cited in the note. In *Spiers* v. *Morris*, 9 Bingh. 687, it was decided that entries of receipt of rent by a deceased executor, who received and accounted for it in that capacity, and under whom the plaintiff claimed, were evidence for the plaintiff. So in *Lichfield* v *Stacy*, 6 Carr. & Payne, 139, it was held, that entries signed by a deceased agent by which such agent was charged, were receivable in evidence, though the entries themselves were not in his handwriting. In both of these cases the court rely much on the fact, that the entries were made against the interest of the parties making them.

The American cases do not seem to demand this additional security. See *Nicholas* v. *Webb*, 8 Wheat. 326; *Halliday* v. *Martinet*, 20 Johns. R. 168; *Halliday* v. *Littlepage*, 2 Munf. 316; *Welsh* v. *Barrett*, 15 Mass. R. 380; *Union Bank* v. *Knapp*, *supra*; *The Farmers' and Mechanics' Bank* v. *Boraef*, 1 Rawle, 152; *Brigs* v. *Low*, 5 Gill & Johns. 134; *State Bank* v. *Cain*, 1 Breese, 45; *Nichols* v. *Goldsmith*, 7 Wendell, 160.

[2] 2 Stark. Ev. 734; *Francis* v. *Ocean Ins. Co.* 6 Cowen, 404; *Bank of Utica* v. *Hillard*, 5 Cowen, 419; Angell & Ames on Corporations, 408, 409

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of Union Bank v. *Clossey*, 10 Johns. R. 271. It was also, at most, a conditional liability, depending upon the requisition of the bank; which it is not to be presumed would be made in a case of mere mistake, and which if made would be fruitless. The witness was under a mistaken notion that he was bound in honor to compensate for his innocent mistake; but such an opinion does not disqualify a witness.[3] *Pederson* v. *Stoffles*, 1 Campb. 146. It must be a direct interest which is to render a witness incompetent. Ibid. *in notis.*

But it is further objected, that the clerk who made the entries in the blotter is not produced; and therefore that the blotter
109 should not have been admitted in evidence. But it is alleged, and not denied, that he has become insane. If he were dead his handwriting might be proved, as was done in the case of the clerk who kept the journal, and who has deceased. *Pitman* v. *Maddox*, 2 Salk. 690. His insanity renders him as unable to testify as his death would have done. His handwriting was therefore properly proved by another witness.[1]

The objection that the entries were not made by the persons who paid out the money charged, we think ought not to prevail, because according to the course of the business the correctness of the charges of the bank is to be ascertained by the depositer from his checks, which are delivered up every month when his bank book is settled; and if he is careful to preserve his bank book, he has the means of detecting any error. The credit which is given to him, being in the handwriting of some one

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[3] *State* v. *Clark*, 2 Tyler, 277; *Long* v. *Bailie*, 4 Serg. & Rawle, 226. *Fernsler* v. *Carlin*, 3 Serg. & Rawle, 130; *Corman* v. *Foster*, 1 Ashmead, 133; *Smith* v. *Downs*, 6 Connect. R. 365; *Gilpin* v. *Vincent*, 9 Johns. R. 219; *Moore* v. *Hitchcock*, 4 Wendell, 292.

But see *Plumb* v. *Whiting*, 4 Mass. R. 518; *Richardson* v. *Hunt*, 2 Munf. 148; *Senteney* v. *Overton*, 4 Bibb, 445; *Lansingburg* v. *Willard*, 8 Johns. R 428.

See also *Peter* v. *Beall*, 4 Harr. & M'Hen. 342; *Moore* v. *Sheridine*, 2 Harr. & M'Hen. 453; *Henry* v. *Morgan*, 2 Binn. 497; *Skillinger* v. *Bolt*, 1 Connect. R. 147

[1] An instrument attested by a person who has become blind may be proved by evidence of his handwriting, without calling him. *Pedler* v. *Paige*, 1 Moody & Rob. 258. A book account may be proved by proving the handwriting of the clerk, who made the entries, if he be out of the State. *Elms* v. *Chevis*, 2 M'Cord, 350. But see *Kennedy* v. *Fairman*, 1 Haywood, 458.

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authorized by the bank to make it, is as obligatory upon the bank as a formal receipt given for every sum deposited would be. The books, having been authenticated, as before stated, were properly submitted to the jury as competent evidence, and they were the judges of the weight of the evidence.

It will be perceived, that this decision does not touch or enlarge the doctrine of the admissibility of the books of a merchant or other person, who makes the entries himself, and who is permitted, according to the practice in Massachusetts and in most, if not all, of the New England States, to make his suppletory oath respecting the charges.[2] In regard to cash, the sums to be proved in that manner have been limited in this State to 40 shillings, or 6 dollars 66 cents.[3] But this decision proceeds upon the ground before stated, warranted by the authorities of the common law, and independently of our local usage, which admits the party in certain cases to verify his books of account by his own oath.

There is however another matter of defence which we think a sufficient answer to this action, and that is the statute of limitations.

It appears that the supposed mistake was committed in November, 1817. The defendant has pleaded, that the cause of

[2] See *Cogswell* v. *Dolliver*, 2 Mass. R. (Rand's ed.) 222, and the numerous cases cited in note (a); *Smith* v. *Sanford*, 12 Pick. 139; *Holmes* v. *Marden*, 12 Pick. 169. In this last case it was decided, that where a party's own books, with his suppletory oath, are competent evidence to prove the charges therein contained, secondary evidence of the contents is admissible in case the books are lost or destroyed. But he, who voluntarily and without accident or mistake destroys primary evidence, thereby deprives himself of the use of secondary evidence. *Broadwell* v. *Stiles*, 3 Halst. 58. Evidence that the party swearing to his own account books is unworthy of belief on oath, is admissible. *Kitchen* v. *Tyson*, 2 Murphey, 314. In *Linnell* v. *Sutherland*, 11 Wendell, 568, it was held, that, in a suit by a mechanic for work done in his line of business, after proof of one or two items of his account, the production of his books of account, with proof that he kept honest and fair books, was competent evidence. In South Carolina the books of a *schoolmaster* were held not admissible, to prove his account for schooling. *Pelzer* v. *Cranston*, 2 M'Cord, 328.

[3] *Dunn* v. *Whitney*, 1 Fairfield, 9. But a charge for 2088 pounds of wool may be recovered in an action on book account, if sold and delivered, and the object of the action is to recover the just value of the wool. *Leach* v. *Shepard*, 5 Vermont R. 363 But see *Dunn* v. *Whitney*, *supra*; *Terill* v. *Beecher*, 9 Connect. R. 344

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action accrued more than six years prior to the commencement of this suit. The plaintiff has replied that the defendant has promised within six years; and he contends that the account is open, mutual, and running, from that time until January, 1824. If that is true, the law is well settled, that every charge within six years is to be considered as an acknowledgment that there is an unsettled account, and as evidence of a promise to pay the balance. Thus in *Catling et al. Ex'rs* v. *Skoulding et al.* 6 T. R. 189, the testator was an attorney, and his demand against the defendants was for rent. The defendants filed a set-off for articles of merchandise furnished by them as vintners and tallowchandlers. But the case finds expressly, that *there never was any settlement of accounts between the testator and the defendants.* It appeared that the last half year's rent on one side, and one or two articles of merchandise on the other side, were charged within six years. Lord *Kenyon* delivered the opinion of the court, and said, that "every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained; and any act which the jury may consider as an acknowledgment of its being an open account is sufficient to take the case out of the statute." And he made the proper distinction between that case and the case of *Cotes* v. *Harris*, Bull. N. P. 149, where the items were all on one side; holding that in such case the last item within six years should not draw after it those items which were of longer standing.[1] This case seems to us to have been rightly decided.

But we do not think that the facts in the case at bar do prove this account to have been open and running from November, 1817, to January, 1824. On the contrary, it is proved that the accounts have been stated and settled monthly, and that the checks, which were the vouchers for all the charges against the defendant, were then given up. It is contended, however, by the counsel for the plaintiffs, that as the accounts did not exactly balance each other at the end of each month, and as the money was not in fact paid by the one to the other party who

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Turnbull v. *Strohecker*, 4 M'Cord, 211; *Buntin* v. *Lugoo*, 1 Blackford, 37.

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happened to be the creditor, but the differences were carried forward from time to time, therefore the accounts must be considered as open and running on, notwithstanding those monthly settlements; and we are referred to the case of *Farrington* v *Lee*, 1 Mod. 269, and 2 Mod. 312, as authority for that position. That was an action of *assumpsit*, grounded upon an account which had been stated more than six years before. The defendant pleaded the statute of limitations. The plaintiff replied that the account was between merchants, and concerned trade and merchandise, and so was excepted from the operation of the statute; but the court gave judgment for the defendant; and held, that where the account is once stated, (as it was in that case,) the plaintiff must bring his action within six years. That was decisive of the case in favor of the defendant. But the court undertook to settle a point not required to be decided in that case, which is now relied upon by the counsel for the plaintiff, *viz.* that "if the account be adjusted, and a following account is added, in such case the plaintiff shall not be barred by the statute, because *it is a running account.*" But to what is the following account to be added? Not to the former account as it stood, but to the balance of the former account as it had been settled. That balance constitutes one of the items of the new account; and if the new account shall run on mutually to a time within six years, that balance, although arising more than six years before, will be saved and drawn out, as it is sometimes expressed, from the operation of the statute, by the charges which are within six years. If that case is to have this construction, it is to be supported, and is conformable to the doctrine laid down by Lord *Kenyon*, in *Catling* v. *Skould ing*, before cited. For example, suppose that the balance of the account stated in November, 1817, had been carried to a new account, which had continued to run on mutually until January, 1824, without any intervening settlement. In such case the law would infer a promise to account for all the items in such new account and to pay the balance of the same. But this construction will not avail the plaintiff, because the account which was added to the balance of November, 1817, did not continue open and running until January, 1824, but was open 112 and running only for a month at a time. Three or four state-

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ments and settlements were made by the parties between November, 1817, and the commencement of the six years next before this suit was brought.

The plaintiff cannot prevail unless we adopt the argument of his counsel, which has been pressed with much force and ingenuity, that where accounts are settled by carrying the balances forward instead of paying the same in cash, they are to be considered as open and running accounts from the beginning, and so not within the statute of limitations. We do not think this inference is to be drawn from the case of *Farrington* v. *Lee*, cited for the plaintiff, but if it is, we should consider that this point was as erroneously decided as was another in the same case, namely, that the saving clause in the statute as to merchants' accounts extends only to actions of *account*. It is now settled that the exception is to be applied to actions of *assumpsit*, as well as to actions of account. *Mandeville* v. *Wilson*, 5 Cranch, 18. Indeed contradictory and unsound opinions touching the exception in the statute are not only to be found in that case, but they abound in the books of the law. Lord *Eldon*, in *Foster* v. *Hodgson*, 19 Ves. 184, thinks that the opinions in regard to the question, whether the same law that applies to *open* accounts applies to *merchants'* accounts, are not to be reconciled; one opinion being, that accounts between merchants are not within the statute at all, but stand just as they would if no statute of limitations had been made, while another, and it seems to us the better opinion, is, that they are barred by the statute, if more than six years have passed since the dealing ceased.[1] *Barber* v. *Barber*, 18 Ves. 286; *Webber* v. *Tivill*, 2 Wms's Saund. 127, and notes 6, 7.

But however that may be, the point now under consideration is, whether the accounts between these parties were open and current from November, 1817, so as to warrant the direction to the jury, that the law inferred a promise to pay within six years.

We have met with no case where accounts, which had been so settled, were held to be open from the beginning, because
113 the balances were carried forward instead of being paid in

[1] This doctrine is expressly overruled in *Bass* v. *Bass*, 6 Pick. 362; *Bass* v. *Bass*, 8 Pick. 187 See *post*, 113, note 1; Revised Stat. *c* 120, § 5

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cash. Nor is it reasonable that it should be so. Lord *Hardwicke*, in *Welford* v. *Liddel*, 2 Ves. sen. 400, considered that the exception in the statute relating to merchants' accounts, "was to prevent dividing the account between merchants, where it was a running account, when perhaps part might have begun long before and the account never settled, and perhaps there might have been dealing and transactions within the time of the statute." Now it would be just as contrary to the meaning of the statute, to open an account stated, as it would be to divide a running account. And can it be said that the parties in this case have not settled? Are their accounts unliquidated, as if no statement of them had been made? A stated account is an agreement by both parties that all the articles are true. *Trueman* v. *Hurst*, 1 T. R. 42. And upon an *insimul computassent* the plaintiff is not obliged to give evidence of the articles. It is sufficient if he prove the account stated. *Bartlett* v. *Emery*, 1 T. R. 42, *in notis*. "An account between partners in trade, after the death of one of them, shall be taken only from the time the same was last balanced." *Beak* v *Beak*, 1 Vin. *Account*, (*D. a.*) *pl.* 3.

A stated account was formerly held to be conclusive; and it is now so considered, until leave is given to surcharge, falsify, or open it. That is obtained by a bill in chancery for that purpose. In a bill before Lord *Thurlow* to open an account which had been settled, he held that the expression of "errors excepted," did not prevent its being a settled account; and he considered the fact that the balance had been carried over, as showing that the account had been settled. *Johnson* v. *Curtis*, 3 Bro. C. C. 266.

The acknowledgment which is to be inferred from the mutual and open accounts within six years, should be limited to the items appearing in the same. If, for example, one of the items should be a sum of money, being the balance of a former account settled more than six years before the action, it would be protected from the operation of the statute by the items which are within six years.[1] In such a case the law would infer a

[1] So if there is no item in the account within six years. *Bass* v. *Bass*, 6 Pick. 362; *Mandeville* v. *Wilson*, 5 Cranch, 15; *M'Lellan* v. *Crofton*, 6 Greenl. 308; *Davis* v. *Smith*, 4 Greenl. 339; *Stiles* v. *Donaldson*, 2 Dallas, 264;

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promise to settle for all the items of the new account. The promise and acknowledgment may be reasonably extended so far; but not to the various charges and disbursements in former times, from which the balance charged in the open account arose. What of doubt now appears, might in the time of the transaction have been explained by papers, vouchers, or witnesses; but it would be doing great violence to go behind the account which is open and current, and behind a hundred or more stated accounts, to inquire if at some former period during the trade between the parties, perhaps some twenty or forty years ago, a mistake did not happen in one or more of the settlements, which, if corrected, would make the balance constituting one item in the open account to be either too little, or too great, or on the other side. We do not think the case of *Farrington* v. *Lee* will warrant such a construction; and if it will, we cannot yield to its authority. Such a decision would lead to great perplexity, vexation, and uncertainty in commercial concerns, and would open a door to endless litigation.[1]

We are therefore of opinion that a new trial should be granted.

Godfrey v. *Sanders*, 3 Wils. 94. But see *Coster* v. *Murray*, 5 Johns. Ch. R. 522; *Murray* v. *Coster*, 20 Johns. R. 582; *Ramchander* v. *Hammond*, 2 Johns. R. 200; *Farrington* v. *Lee*, 1 Mod. 269; *Barber* v. *Barber*, 18 Ves. 286; *James* v. *Richmond*, 5 Ohio R. 338; *Rhyn* v. *Vincent*, 1 M'Cord, 150; *Spring* v. *Gray*, 5 Mason, 528.

The law on this head is now settled in this State by statute; which enacts, that "in all actions of debt or assumpsit, brought to recover the balance, due upon a mutual and open account current, the cause of action shall be deemed to have accrued, at the time of the last item proved in such account." Revised Stat. *c.* 120, § 5.

[1] As to mutual accounts, see further *Franklin* v. *Camp*, 1 Coxe, (New Jers.) 196; *Smith* v. *Ruecastle*, 2 Halsted, 357; *Bennett* v. *Davis*, 1 N. Hamp R. 19; *Stiles* v. *Donaldson*, 2 Yeates, 105; *Coleman* v. *Hutchinson*, 3 Bibb 209; *Chamberlain* v. *Cuyler*, 9 Wendell, 126; *M'Lellan* v. *Crofton*, 6 Greenl 308; *M'Naughton* v. *Norris*, 1 Haywood, 216; *Bond* v. Gray, 7 Cranch, 350 *Gold* v. *Whitcomb*, 14 Pick 188.

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CHARLES BARNEY *et al. versus* JESSE COFFIN.

By the shipping articles of a whaling ship the seamen were to have shares of the net proceeds of the oil to be obtained, in lieu of wages. According to the usage of that business, the master supplies the seamen, when abroad, with necessary clothing, and retains from their shares respectively the amount advanced; and this, whether they return in the ship or desert, and whether their shares are or are not assigned. *Held*, that this was a reasonable usage, and that the master, by putting the oil, marked with the ship's mark, on a wharf, whence part of it was taken by the plaintiffs, but afterwards returned, and by delivering it up to a general agent for settling the voyage to be sold, did not part with his lien.

Such seamen, after assigning their shares, forfeited them by desertion, but the ship-owners nevertheless authorized their agents to pay the shares to the assignee, making deductions for the expenses of procuring other seamen; and the agents gave the assignee a written promise, upon which they were afterwards held personally liable to pay him the shares. Whereupon they brought an action of *assumpsit* in their own names against the master, to whom such shares had been paid over by the general agent for settling the voyage, and the action was sustained for the balance after deducting the amount of the master's advances.

THIS was an action of *assumpsit* for money had and received, lent and accommodated, laid out and expended, and on an account annexed to the writ.

The defendant owned one sixteenth part of the ship Vulture, of Nantucket, and was captain of her on a whaling voyage to the Pacific ocean. The ship sailed from Nantucket on the 11th of September, 1819, and returned on the 1st of December, 1822. Charles Barney, one of the plaintiffs, owned one sixteenth part of the ship. The several owners had the same proportional interest in the oil &c. procured, as in the ship. Six men, by the procurement of Peleg S. Folger, shipped as seamen for the voyage and signed the shipping articles, by which they were to receive, in lieu of wages, five of them a hundred-and-fortieth part each, and the sixth a hundred and thirty-ninth part, of the net proceeds of all oil &c. that should be obtained during the voyage, as soon after the return of the ship to Nantucket as the oil &c. could be sold and the voyage made up by the owners. These men received clothing &c. from Folger previous to the commencement of the voyage, and before leaving Nantucket they assigned to him, in writing, all that should be coming to them as mariners on that voyage, and their orders in his favor were accepted by Daniel Barney. Evidence 116
was offered to show that this Barney was agent for the owners.

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The ship continued at sea nine months longer than was anticipated, and in consequence the officers and crew were in great want of clothing. The defendant therefore supplied them, as otherwise the voyage must have been abandoned. Four of the six seamen forfeited their shares or lays by desertion. After the ship's arrival the owners appointed Timothy Hussey agent to settle the voyage. The oil constituting the lays of the six men was put on the wharf at Nantucket in one parcel, and marked with the ship's mark. So much of the residue as belonged to the ship-owners was delivered to them. At a meeting of the owners they passed a vote to pay Folger the lays of the deserters, making certain deductions for charges accruing in consequence of their desertion. The defendant was present at the meeting, objected to the proceedings, and stated that his bills for clothing delivered to the men had not been paid. The plaintiffs were requested by some of the owners to inform Folger of the disposition which they intended to make of the lays. After this meeting the defendant proceeded to take from the wharf into his own custody the oil set apart for the six lays, but was unable to obtain more than 638 gallons of it, as the plaintiffs at the same time took the residue, which was 780 gallons. The plaintiffs delivered to Folger a copy of the vote before mentioned, and an instrument dated the 10th of December, 1822, signed by them as a committee of the owners, in which, in consideration of 20 dollars received of Folger, they agree to deliver and pay over to him the amount of the lays of the six men, he paying his proportion of the expense of procuring other hands on the voyage. There was no evidence that the owners knew that such an instrument would be given by the plaintiffs, and there was evidence on both sides touching the plaintiffs' authority to make the settlement with Folger. Afterwards the owners directed the plaintiffs to deliver to the defendant the 780 gallons of oil, and they did so. In March, 1823, the defendant delivered this oil, together with the 638 gallons, to Hussey, who sold it for the net sum of about 744 dollars, which
17 he paid over to the defendant. Part of this oil constituted the lays of the two men who did not desert. There was no evidence that the defendant had ever been directed by the owners to pay the 744 dollars to the plaintiffs or any other person, and

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he always claimed to hold the same and the six lays, until his bills for clothing should be paid. No part of the bills was alleged to have been paid or tendered. The plaintiffs did not prove any assignment of the six lays or the proceeds to themselves. No act of the owners disposing of the lays was proved, except the written vote. At the Court of Common Pleas, in May, 1823, at Nantucket, Folger recovered judgment against the plaintiffs on their obligation to him of the 10th of December, 1822; and the amount of the judgment was paid by them on the 13th of November, 1823.

The defendant proved by witnesses, who were not contradicted, that it is usual for captains of vessels on whaling voyages, to provide and deliver clothing to their crews while abroad; that by reason of the great length of these voyages it is absolutely necessary to do so or to abandon the voyage; that the captain's bills for such clothing are paid from the lays of the seamen furnished, and this, whether the seamen return in the ship or desert, and whether their lays are or are not assigned, and that the captain has a lien on the lays for the amount of clothing furnished; and that at the end of the voyage he usually delivers his bills, with the seamen's lays, to the agent for settling the voyage, who sells the lays and deducts the bills from the proceeds and pays the amount deducted to the captain.

With a view to settle the questions of law in the case, the judge directed the jury that the only question for their consideration was, whether the plaintiffs had pursued the orders of the owners in paying Folger, and that if they should find they had done so, the verdict should be in their favor for the amount of proceeds received by the defendant, with interest. The verdict was for the plaintiffs for 778 dollars, 54 cents, under this direction.

Adan for the defendant. The seamen were not to have a part of the oil, for then the proper deductions could not be made from their lays, but they were to be allowed a part of the net proceeds after the voyage should be settled. Their lays were therefore mere *choses in action*, and Folger or his assignees must have sued the ship-owners in their names. *Usher* v. *D'Wolfe*, 13 Mass. R. 290. It may be said that Daniel Barney accepted the orders of assignment, but it does not appear

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that he was authorized to accept them, nor for whom he did it. As ship's husband he had no such authority.

In a branch of business of so peculiar a character as the whale fishery we may expect to find peculiar usages. The usage proved is reasonable and of long continuance and founded upon necessity, and it furnishes a sufficient ground for a lien upon the seamen's lays. The practice of admiralty courts and the usage of trade generally is in favor of such lien. *Gardner* v. *Ship New Jersey*, 1 Peters's Adm. Rep. 223; *Hart* v. *Littlejohn*, ibid. 121; *Noble* v. *Kennoway*, 2 Doug. 510; *Vallance* v. *Dewar*, 1 Campb. 503; *Winthrop* v. *Carleton*, 12 Mass. R. 4; Park on Ins. (7th ed.) 630.

The only point determined by the verdict is, that the plaintiffs, in settling with Folger, pursued the authority given them by the ship-owners; but it does not follow that the defendant is therefore liable to them. He was a part-owner and had an interest in the lays, and the vote of the majority in interest could not bind him in regard to the four forfeited lays or the two others, the voyage having been terminated. The plaintiffs as agents have their remedy against those only who authorized their proceedings.

The men having no interest in the oil itself, but only in the proceeds, the ship-owners might maintain trover for it, but not the plaintiffs. The defendant however had a lien for his advances even against the owners; Montague on Lien (Amer. ed.) 210, 211; *Milward* v. *Hallett*, 2 Caines's Rep. 77; *Lane* v. *Penniman*, 4 Mass. R. 92; *Gardner* v. *The New Jersey*, 1 Peters's Adm. Rep. 227; 2 Emerig. 458; Abbott, 127, 133; and the lien was not lost by the delivery of the oil to the agent for settling the voyage. *Urquhart* v. *M'Iver*, 4 Johns. R. 103; 1 Dane's Abr. 617.

There was no assignment of the lays to the plaintiffs. Paying the money on Folger's execution was not a purchase of
19 them; and besides, it was not paid until several months after this action was brought. But if there was an assignment, it was either of a *chose in action*, and then the suit should have been in the names of the assignors, or of a specific article, and then to maintain trover the plaintiffs should have tendered the

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amount of the defendant's lien; and as trover therefore would not lie, this action in lieu of trover cannot be maintained. *Nicholson* v. *Chapman*, 2 H. Bl. 254.

Prescott contrà. Folger took an assignment from the seamen, which was accepted by the agent of the ship. This vested the right in Folger, and he might have taken the oil or have sued the ship-owners in his own name and recovered the seamen's earnings, making the usual deductions. A quantity of oil was set apart on account of the seamen's lays, and the ship-owners agreed that it should be delivered to Folger on certain conditions, and the plaintiffs, being authorized by the owners, promised to deliver him the oil accordingly. On this promise a judgment has been recovered against them, which they have satisfied; and they may therefore maintain this action.

If the oil was not Folger's, there was a special property in the plaintiffs. The oil was on a wharf and in their custody; and necessarily so, in order that they might fulfil their contract.

The question then is, whether the defendant had a lien. To constitute a lien there must be actual possession and a right of possession. But the general property in the oil was in the ship-owners, and the defendant could not say he would not deliver it to them until his advances were paid. Whitaker on Lien, 65; *Lickbarrow* v. *Mason*, 6 East, 27, note; *Smith* v. *Plummer*, 1 Barn. & Ald. 575; *Hussey* v. *Christie*, 9 East, 426. But supposing the defendant had a lien, by putting the oil on the wharf and separating it from the rest of the cargo, his lien was lost; and it did not revive when he got possession of it the second time, the rights of third persons having intervened.

It was not necessary to bring the action in the name of Folger. The oil was considered by him and by the plaintiffs, to be in the possession of the plaintiffs, and they became Folger's bailees. They have done nothing to give the defendant a right to resist their own or Folger's possession, and having been compelled to pay Folger, they may maintain the action in their own names. 120

The usage proved was unreasonable. It would be giving a master a dangerous power to allow him to supply his seamen

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with clothing upon a pledge of their lays, as he would be tempted to take advantage of their situation

L. Shaw in reply. The vote of the ship-owners is argued upon as if it meant that Folger should have the oil specifically, whereas the intention was that he should have the *lays*, that is, the shares of the net proceeds of the oil after the usual deductions. They agree to place him in the same situation as if there had been no desertion, the situation of an owner of a *chose in action*, having a right to demand a sum of money after equitable deductions have been made. The agreement of the plaintiffs with Folger did not mean that the lays were in the hands of themselves as a committee, but in the hands of the ship-owners. It was held, and perhaps properly, in Folger's action against them, that they had bound themselves by the agreement, but there must have been at least a misapprehension on their part in submitting to a default, and paying the whole sum claimed, without the usual deductions for the advances made by the defendant. If the ship-owners had a right to retain for those advances, the defendant, being a part-owner, is not liable to this action. As to a lien by usage, it is a right derived from contract, but usage is evidence of, or makes a part of, the contract. The usage proved is not unreasonable. It is said that the master has a dangerous power, but a master with a ship and cargo has always power to do great mischief, and it is therefore necessary to employ good men in order that the power may not be abused. It is said that the lien, if any, has been lost; but if the usage has established a lien, the mode of enforcing it is a very natural one. Putting the oil into the hands of an agent for all concerned is not parting with the lien. It is necessary in all cases to unload, and the defendant acted
121 according to the usage in putting the oil on the wharf. Marking it with the ship's mark and afterwards taking a part of it, and indeed the defendant's conduct from beginning to end, showed that he intended to insist on being paid his advances There is nothing like a sale and delivery to Folger in the case, and he never had power to pass a title to other persons; and if he had, there is no evidence that he did pass the property to these plaintiffs. If they have acquired any right, it is an equita-

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ble one in consequence of having paid Folger; they have no legal ground of action.

PARKER C. J. The first question necessary to be settled in this case is, whether the plaintiffs have shown any legal title to any part of the proceeds of the oil belonging to the six seamen, so as to be able to maintain the action for the whole or such balance as may be found justly due to them.

The whole amount of the shares of the seamen was assigned for a valuable consideration, according to the custom of that trade, to Folger, which assignment was notified to the person acting as agent for the owners and assented to by him, and afterwards sufficiently ratified by the owners; so that if the oil or proceeds had remained in the hands of the owners or their agent, an action would undoubtedly have lain against him or them by Folger in his own name, according to the case of *Mowry* v. *Todd*, 12 Mass. R. 281, there being an express promise to deliver the proceeds to him; for the jury have found that the plaintiff acted under the authority of the owners in the settlement they made with Folger. An action having been brought by Folger against the plaintiffs and judgment rendered against them, and the amount paid over as testified, the plaintiffs would undoubtedly have a right to retain, in a settlement with the owners, if the property or proceeds remained in their hands, or to have an action against the owners, if it had been paid over to them, it being in such case so much money paid to the use of the owners and at their request, as the law would imply.[1] And it seems to me, that under the circumstances proved they would be entitled to an action for the specific oil which belonged to the seamen and was assigned to Folger, because Folger had virtually assigned it to them, by taking their 122
accountable receipt for the proceeds, or at least they became thereby his bailees, so as to have a qualified property therein which would entitle them to an action; and if so, *assumpsit* would lie for the proceeds against any one, who having no right had sold the oil and received the proceeds in money.[1] So that

[1] See 1 Chitty on Pl. (6th Amer. ed.) 383; *Hassinger* v. *Solnes*, 5 Serg. & Rawle, 4; *Packard* v. *Lienow*, 12 Mass. R. 11; *Ott* v. *Chapline*, 3 Harr. & M Hen. 323; *Smith* v. *Sayward*, 5 Greenl. 504.

[1] See 1 Chitty on Pl. (6th Amer. ed.) 385, *et seq.*

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if the defendant, captain of the vessel, has no legal right to retain, I do not see but that the action may be well maintained against him. This makes it necessary to consider the rights of the defendant as they arise out of the facts proved in the case.

And there seems to be no reason to doubt that he had, if not a lien on the oil in a technical form, a right to retain from the proceeds so much as would reimburse him the advances made to the seamen, according to the usage of that trade as proved to exist. He certainly would have a right, upon common principles, without any usage, to retain against the seamen themselves, if they had not assigned. If they had shipped on wages, as is usual in other voyages, he might retain out of their wages advances made in money or clothing necessary for their comfort, and there is no reason why these shares of the oil, which they were to receive in lieu of wages, should not be subject to the same deduction.

Besides, the general usage of these voyages, which of themselves are peculiar and almost confined to Nantucket and New Bedford, is very clearly proved, there being no contradictory evidence, and by that usage the captain makes the advances and retains out of the shares of the men, as well when they are assigned, as when they remain their property; and of this usage Folger, under whom the plaintiffs claim, must be presumed conusant, his claim resting perhaps principally on another usage of the same trade. Nor is it an unwarrantable custom, as suggested by the counsel for the plaintiffs; for nothing can be more reasonable, and indeed necessary, than that in voyages of this sort, which are prosecuted from pole to pole and through almost every climate, the wants of the seamen should be supplied, and if there were no security upon their earnings, there would be nooody to advance.

123 But it is said that the lien, if it ever existed, has been lost, first, by surrendering the whole of the oil to the agent of the owners, and secondly, by afterwards, when the defendant had taken possession by order of the owners, delivering it over again to the agent for sale. But the nature and circumstances of the property and the voyage should be considered. The men by their original contract had no right to have their proportion of oil and take it to themselves, but the whole was to

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be sold and they were to have their share of the proceeds. It is true, that by consent of the owners, their proportion was set apart and all came into the hands of the defendant. Now his parting with it for the purpose of having it sold and converted into money, was by no means giving up his lien, for while it was in the possession of the agent his lien continued, and having received the proceeds he is accountable only for the balance, after deducting the amount of his advances. But he has no right to retain the whole, nor is he accountable to any but the plaintiffs for the balance; not to the seamen, for they assigned their property to Folger; not to Folger, for he has received the money and transferred by operation of law his interest to the plaintiffs; not to the owners of the vessel, for they have already received what, by their own consent, is to be taken for their shares.

I see therefore no good reason why the plaintiffs should not recover the balance, which the defendant might have discharged himself of and saved the costs of this suit. We think the defendant has a right to retain the advances made by him to the six seamen, the proceeds of whose oil have come into his hands, not however *in solidum*, but each seaman to be responsible for his own debt, and if that can be adjusted so as to ascertain the balance, the verdict will be amended accordingly.[1]

1 See *Baxter* v. *Rodman*, *post*, 435.

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THOMAS GERRISH *versus* ISAAC TRAIN.

Trespass *de bon. asp.*; plea, property in one S, and not in the plaintiff, and justifying as deputy sheriff; replication, *de sua injurià* and traversing that the property was in S; rejoinder, that it was in S; issue, and verdict of guilty. *Held*, that the issue was immaterial, and a repleader ordered. *Held*, also, that the plea, even if it amounted to the general issue, was well enough, not being specially demurred to, and that the first fault was in the replication, in not taking issue on the traverse in the plea.

Held also, that the verdict was bad, being argumentative; but whether it was amendable or cured by the statutes of jeofails, *quære*.

If the court are at a loss how to give judgment, a repleader will be awarded on the motion of either party.

TRESPASS *de bonis asportatis*. Plea, that the property of the goods, at the time of the taking, was in one Stevens, and not in the plaintiff; that the defendant was a deputy sheriff, and that he took the goods by virtue of a writ of attachment against Stevens in favor of one Shattuck. Replication, that the defendant took the goods of his own wrong, traversing the property's being in Stevens, and concluding with a verification. Rejoinder, that the property was in Stevens, and concluding to the country; and issue joined thereon.

Ward C. J. of C. C. P. was of opinion, that the issue ought to have been taken upon the property's being in the plaintiff, but inasmuch as a finding that the property was in Stevens would have been decisive against the plaintiff, he refused to order a repleader before a trial; and the case was committed to the jury, who returned a general verdict that the defendant was guilty, and assessed damages. It not being observed that the verdict did not follow the issue, it was affirmed. Upon a motion by the defendant, which was resisted by the plaintiff, the judge granted a new trial and ordered that the parties should replead.

To these several determinations the plaintiff filed his exceptions.

July 13th. *Dunlap*, in support of the exceptions, said that perhaps the replication, notwithstanding it contained a traverse upon a traverse, might be sustained *Fenner* v. *Fisher*, Cro. Eliz. 288 *Cary* v. *Holt*, 2 Stra. 1238, and 11 East, 70, note; Com Dig. *Pleader*, *G*, 22. But the first fault was in the defendant

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his plea amounting to the general issue; *Hallet* v. *Birt*, Skin. 674, 5 Mod. 252, and 1 Salk. 393; *Gibbons* v. *Pepper*, 4 Mod. 404; *Moors* v. *Parker*, 3 Mass. R. 311; and therefore, even if the issue was immaterial, a repleader cannot be awarded for his benefit. *Webster* v. *Bannister*, 1 Doug. 395; *Kempe* v. *Crewes*, 1 Ld. Raym. 170; *United States* v. *Burnham*, 1 Mason, 66; *Eaton* v. *Stone*, 7 Mass. R. 314; 2 Wms's Saund. 319 *c*. But the issue, though improper, was not immaterial, and the verdict was not so wrong that judgment may not be rendered upon it. The plea and rejoinder amount to the general issue, and in this view we have the right verdict. The jury could not have found the defendant guilty without finding the property in the plaintiff, and the Court will not shut their eyes to the justice of the case. *Foster* v. *Jackson*, Hob. 54; *Hawks* v. *Crofton*, 2 Burr. 698; *Porter* v. *Rummery*, 10 Mass. R. 64; Com. Dig. *Pleader*, *S*, 26; *St.* 1784, *c*. 28, § 14.

Morey and *Fuller contrà*, to show that the issue was immaterial and that there should be a repleader, cited 1 Chit. Pl. 597, 631, *et seq.*; 2 Wms's Saund. 319 *a*, note; *Serjeant* v. *Fairfax*, 1 Lev. 32; Com. Dig. *Pleader*, *R*, 18; *Holms* v *Broket*, Cro. Jac. 434; *Tryon* v. *Carter*, 2 Str. 994; *Staple* v. *Hayden*, 2 Salk. 579, 2 Ld. Raym. 922, and 6 Mod. 1; *Witts* v. *Polehampton*, 3 Salk. 305; *Howard v. Wickliffe*, 2 Lev. 135; *Coxe* v. *Cropwell*, Cro. Jac. 5; Bac. Abr. *Pleas &c.*, *M*; *Rex* v. *Philips*, 1 Burr. 292; *Masters* v. *Wood*, 2 Lev. 164; *Carpenter* v. *Starr*, 1 Rol. Rep. 86; Gilb. H. C. P. 147, 153; — and to the point that the verdict was bad, so that judgment could not be rendered upon it, Com. Dig. *Pleader*, *S*, 22; *Rowe* v. *Huntington*, Vaugh. 75; *Shelley* v. *Alsop*, Yelv. 77; *Van Benthuysen* v. *De Witt*, 4 Johns. R. 213; *Drage* v. *Brand*, 2 Wils. 377; *Bishop* v. *Kaye*, 3 Barn. & Ald. 605.

Jan. 14th, 1826.

WILDE J. delivered the opinion of the Court. The first question to be considered is, whether the verdict is to be set aside for informality.

It is very clear that by the principles of the common law it cannot be sustained. The finding must be direct, and cannot be made good by inference. Thus if the defendant pleads

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solvit, and issue is thereon, verdict that the defendant owes the money is not good, for it finds only by argument *quod non solvit*. Com. Dig. *Pleader*, S, 22; 2 Rol. Abr. 693. So, in trespass for taking and cutting leather, the defendant justifies as a searcher of leather, &c., and that in searching he cut it *more scrutator.*; the plaintiff replies, of his own wrong *absque hoc* that he cut it *more scrutator.*; verdict that he cut it of his own wrong is not good. In trover, on not guilty pleaded, the verdict was that the defendant converted the goods to his own use; and this was held bad, though equivalent to a verdict of guilty by necessary inference.

But these are objections to the form of the verdict, and may perhaps be obviated by amendment, or the verdict may be aided by some of the statutes of jeofails.[1] It is however unnecessary to decide this point, as the objections to the pleadings are unanswerable. Nothing appears by the record which can authorize us to render judgment for either party. The verdict can only establish the fact that the goods were not the property of Stephens; *non constat* that they were the property of the plaintiff.[2]

The plaintiff should have taken issue on the traverse in the defendant's plea. But it is argued, that in trespass it is sufficient to traverse the defendant's title, and the case of *Cary* v. *Holt*, 2 Str. 1238, is relied upon to establish this position. This case is more fully reported in a note in 11 East, 70. It was trespass *qu. cl. fregit.* The defendant makes title and gives color. The plaintiff replies *de injuria* and traverses the defendant's title, and it was held good. This is the established rule of pleading in trespass *quare clausum.* The defendant impliedly admits the possession to be in the plaintiff and justifies his right to enter; a traverse of his right or title so to enter is therefore proper. But in trespass *de bonis* the rule is different. If the defendant pleads property in himself or a third person, this is no admission that the pro-

[1] *St.* 32 Hen. 8, c. 30; *Myn* v. *Cole*, Cro. Jac. 87; *Cobb* v. *Brian*, 3 Bos. & Pul. 348, 352; *Winstanly* v. *Head*, 3 Taunt. 237.

[2] A verdict does not help an immaterial issue. *Jones* v. *Bodinner*, Carth 371; *Peck* v *Hill*, 2 Mod. 137; *Cobb* v. *Brian*, 3 Bos. & Pul. 352; *Strong* v *Smith*, 3 Caines's R. 163; *Stafford* v. *Corporation of Albany*, 6 Johns. R 1.

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perty is the plaintiff's, but it is an allegation inconsistent with a material allegation in the declaration, and a traverse is necessary; otherwise pleadings might run into infinite prolixity. 1 Chit. Pl. 593. Thus if the defendant alleges seisin in A from whom he claims, the plaintiff cannot reply seisin in B 127
from whom he claims, without traversing the seisin of A, or confessing and avoiding it. Cro. Eliz. 30.

But it has been argued, that no repleader should be awarded, because the issue was tendered by the defendant and is found against him; and in such case, it is said to be a rule of law, never to grant a repleader on motion of the party against whom the issue is found; and a dictum of *Buller* J. to this effect in the case of *Webster* v. *Bannister*, 1 Doug. 395, is relied on by the plaintiff's counsel. But it appears that the remark alluded to was incidentally made on the argument of the cause, and was not intended to be laid down with much precision. The rule rather seems to be, that a repleader shall not be granted on motion of the party who committed the first fault in pleading, which occasioned the immaterial issue.[1] And even the rule thus laid down is not to be applied, unless enough appears on the record to entitle the opposite party to judgment.[2] *Kempe* v. *Crewes*, 1 Ld. Raym. 167; 1 Chit. Pl. 633.

If the Court are at a loss how to give judgment, a repleader will be awarded on the motion of either party.

In this case the first fault in pleading is in the replication. The plea is well enough; if it amounts to the general issue the plaintiff has no right to complain, and it can only be objected to on special demurrer. It is even favorable for the plaintiff, for it admits the taking. The replication should have tendered an issue on the traverse in the plea. The first fault therefore being on the plaintiff's side, he has no right to object to the defendant's motion for judgment of repleader. But were it otherwise, a repleader would be

[1] *Kirtley* v. *Deck*, 3 Hen. & Munf. 388; *Hammett* v. *Bullitt*, 1 Call, 567; *Smith* v. *Harmanson*, 1 Wash. 6; *Kerr* v. *Dixon*, 2 Call, 379.

[2] And it seems a repleader will not be allowed at all, where the court on the whole record can give judgment. *Parnham* v. *Pacey*, Willes, 532, 533. See *Perkins* v. *Burbank*, 2 Mass. R. 81.

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granted, because nothing appears by the pleadings, or on the record, which can authorize us to give judgment for either party.

A repleader, therefore, is awarded, and the parties must begin again at the first fault, which is in the replication.[3]

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128 THOMAS DAWES, Judge &c., *versus* JOSEPH HEAD *et al.*

To sustain an action upon an administration bond for the benefit of a creditor, there must have been, if the estate is solvent, a judgment of court, ascertaining the debt, and then a demand of satisfaction on the administrator; if insolvent, an allowance of the debt by commissioners, a decree of distribution, and a like demand; wherefore, where an ancillary administrator on an insolvent estate of a person domiciled in a foreign country, represented the estate as insolvent, and commissioners were appointed, and the claims allowed by them were less than the assets here, and the judge of probate decreed payment of such debts in full, and on demand the administrator refused to make such payment, it was *held*, that the decree, treating the estate as solvent, was a nullity, no decree being in such case necessary or authorized by law, and that the non-performance of it was not a breach of the bond.

One of two persons, both subjects of, and domiciled in, the same foreign country, dies indebted to the other, and an original administration is granted in the foreign country and an ancillary one here. *Held*, that such debt, though it may ha been contracted here, must be referred for settlement to the original administration

Where the whole estate of a deceased person domiciled abroad is not sufficient pay all his debts, *it seems* that the funds collected by an ancillary administrator here are not to be applied to the payment in full of the debts due to our own citizens; but the proper course should be, to retain the funds here for a *pro ratâ* distribution according to our laws among our citizens, having regard to all the assets in the hands of the administrators, both principal and ancillary, and to all the debts due by the laws of either country, and disregarding any preference that may be given to one species of debt over another, and to remit any surplus to the principal administrator.

Whether such a disposition of the funds here may be ordered by the probate court, *quære;* but *it seems* that it may be on a bill in chancery.

Whether citizens of another of the United States can be considered as upon the same footing with the citizens of this State in regard to such funds, *quære.* But in the case of a solvent estate *it seems* that they may enforce their demands against the ancillary administrator here having assets.

THIS was an action of debt upon a probate bond given by Joseph Head as principal, and the other defendants as his

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[3] *Cox* v. *Mellish*, 3 Keb. 664; *Stevens* v. *Taliaferro*, 1 Wash. 155; *Smith* v. *Walker*, 1 Wash 135, 136.

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sureties, upon letters of administration with the will annexed being granted to him on the estate of Thomas Stewart; and the suit was prosecuted for the benefit of Robert Lenox, a citizen of New York, James Sheafe, a citizen of New Hampshire, and Thomas Bruce, a subject of Great Britain and living in London.

To a plea of performance the plaintiff replied, that the administrator represented the estate as insolvent; that afterwards, on the 18th of January, 1819, commissioners were 129
appointed to examine all claims of the creditors of the estate, and that they allowed Lenox and Sheafe a certain sum upon their claim; that on the 8th of January, 1822, the judge of probate decreed, that inasmuch as the goods and estate in the hands of the administrator, according to his account before that time settled and allowed, were more than sufficient to pay all the claims which had been allowed by the commissioners, as well as the amount of a judgment which had been recovered by Bruce and been added to the report of the commissioners, the administrator should forthwith pay to the several creditors named in the report the full amount of their several claims with interest; and that on the 12th of February, 1822, Lenox and Sheafe presented the decree to the administrator, and demanded payment of their claim, and the interest due thereon, which the administrator refused to make, and so had broken his bond.

The defendants rejoined, that Stewart was a native subject of the king of Great Britain, and was, on the first of June, 1814, and long before and until the time of his decease on the 23d of December, 1816, domiciled at Calcutta in Bengal; that his last will and testament, dated in October, 1814, was duly proved by John Palmer, of Calcutta, one of the executors, in January, 1817, in the Supreme Court of Judicature at Fort William in Bengal, and that the estate and effects of Stewart were in a due course of administration at Calcutta before the allowance and registry of the will in the Probate Court in this county; that Stewart died insolvent, and that his estate and effects in the hands of his executor in Calcutta were insufficient to pay the demands duly registered there against the estate, among which was that of Lenox and

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Sheafe; that Bruce was a native subject of the king of Great Britain, and was in 1807, and had been ever since, domiciled in the city of London; that the goods &c. of Stewart in the hands of the administrator were all needed in Calcutta by the executor, to enable him to pay the just and legal claims against
130 the estate, and to settle the same, and duly to perform his duties as executor according to the laws in force in Bengal.

To this there was a general demurrer.

The non-payment of Bruce's debt was not assigned in the replication as a breach of the bond, but by the consent of the parties it was to be considered as if it had been so assigned.

The cause was first argued at March term, 1823, and afterwards in writing, by *Aylwin* for the plaintiff and *S. Hubbard* for the defendants.

Argument for the plaintiff. This Court, upon the general principles of our law, has jurisdiction in this case. 1. Because the property of the deceased is within this State. Fitz. N. B. 114 *B*; Co. Lit. 261 *b*; Sir L. Jenkins's Life, *vol* 1, *p.* lxxix; 3 Bl. Com. 107; and Col. Law of 1644 (Anc. Chart. &c. 49, 50), which accords with more recent statutes.

2. Because the representative of the deceased is here. *Bissell* v. *Briggs*, 9 Mass. R. 462; *Jacobs* v. *Hull*, 12 Mass. R. 25; *Barrell* v. *Benjamin*, 15 Mass. R. 354.

3. The Court has jurisdiction and has a right to decree payment of the debts in question, upon the ground of positive law. The *St.* 1785, *c.* 12, "for the filing and recording of wills proved without this government," gives a general authority to the judges of probate to "take bonds of the executor or grant administration of the said testator's estate lying in this government, with the will annexed, and *settle the said estate in the same way and manner as by law he may or can upon the estates of testators, whose wills have been duly proved before him.*"

The object of taking a bond from the executor or administrator, by our laws, is not only to procure an inventory, but also to compel the discharge of the debts of the deceased, so far as the assets may extend. With this view various positive regulations have been made by the legislature, which are

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niversal in their character and language; one of which has been pursued in the present instance by a suit on the probate bond, upon refusal of payment of debts due from the deceased, after they had been established by judgment of a court of law or by commissioners. The administrator of the deceased foreigner has here sought the protection of our law, has clothed himself with its powers, and has given bonds to discharge his trust, in the same manner as if the deceased had been a citizen and been domiciled with us. The debt due to Lenox and Sheafe is due to citizens of the United States, who are entitled to all the privileges of citizens of this State; that due to Bruce was actually contracted here, and its validity has been established by the judgment of this Court against the representative of the deceased. Further, it is a general principle of jurisprudence, that the law of the forum, in which the suit is instituted, shall be the guide in furnishing the remedy; and whatever may be that law, the party prosecuting is entitled to the benefit of it. *Blanchard* v. *Russell*, 13 Mass. R. 1; *Pearsall* v. *Dwight*, 2 Mass. R. 87.

It is objected, however, that although the ground taken may support the jurisdiction of our courts *inter vivos*, yet it will not reach the argument assumed in the defence, which rests on a principle of public law, giving exclusive jurisdiction over the property of a deceased person to the *forum domicilii*; and that the decision in *Dawes* v. *Boylston*, 9 Mass. R. 337, furnishes an answer to the construction attempted to be given to the statute for the filing of wills proved without the State.

It is therefore necessary to examine this supposed rule and to ascertain its true extent; whether if it be allowed as it regards the transmission and succession of property, it controls the general law of debtor and creditor which subjects property to an implied hypothecation, or excludes the courts of the place where the property may be found, from limiting or varying the application of such rule, according as it may be beneficial or injurious to the citizens of the State. And it is apprehended that it will appear from the following authorities, that the rule is not a part of the public law received among

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modern nations, but that it is occasionally practised by some and assented to by others, and has for its basis only the positive law of particular states, and the conventional law of others arising from treaty. Grot. De Jure Bell. ac Pac. *lib.* 2, *c.* 7; ibid. *lib.* 2, *c.* 6, § 14, and Barbeyrac's note 6; Vattel, *liv.* 2, § 110; Martens, *liv.* 3, *c.* 3 § 17, 18; Domat, *part.* 2, *lib.* 1, *pref. art.* 13, (2nd ed. Lond. 1737, *p.* 530); ibid. *part.* 2, *lib.* 1, *tit.* 1, § 2, *art.* 9; Pothier, Des Successions, *c.* 1, *art.* 1, § 1, and *art.* 2, § 1; Code (Civil) Napoleon, *art.* 11, 726, and Motifs &c. *no.* 4, 5; U. S. Laws (edit. 1815), *vol.* 1, *pp.* 80, 153, 179, 232, 269. And if the rule of the *lex domicilii* in respect to successions is not a part of the recognised law of nations, the argument of the defendants, so far as it rests upon that assumption, must fail.

It has been suggested, however, that it may be considered as a rule of interpretation adopted by the common law, and not of jurisdiction; and that the effect given to transfers under the bankrupt laws in England and Scotland, and to the *cessio bonorum* of Holland, and other analogous assignments, support this distinction.

It is not questioned, that the right of disposing of property *inter vivos* is derivable from the law of nature, and has been sanctioned by writers on the law of nations; yet the extent in which it may be exercised in different countries is not settled, and the principle is far from being universal. On this subject it has been remarked, that the English courts have exhibited a distressing versatility of opinion, when deciding upon the effect of transfers in cases of bankruptcy. The cases of *Cleve* v. *Mills*, 1 Cooke's Bankr. Law, (4th ed.) 303, — *Waring* v. *Knight*, ibid. 307, — *Mawdesley* v. *Parke*, Cullen's Bankr. Law, 243, — and *Wilson's case* (cited in 1 H. Bl. 691), decided by Lord *Hardwicke*, — are against extending the effect of an assignment beyond the territory of the bankrupt's domicile; while in *Sill* v. *Worswick*, 1 H. Bl. 665, and other cases there cited, *Hunter* v. *Potts*, 4 T. R. 182, with the Scotch cases in 1 Rose (*Append.*), 462, the position is affirmed, that such an assignment vests the property, wherever situated, in the assignees. See also *Selkrig* v. *Davies*, 2 Dow, 230. In the cases between *Holmes* and *Remsen*, 4 Johns. Ch. R. 460.

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and 20 Johns. R. 229, the subject has been discussed and exhausted; it will be sufficient to refer to them. See also *Ex parte Cridland*, 3 Ves. & Beame, 97, 100, 101; *Brickwood* v. *Miller*, 3 Meriv. 279, 281, 283.

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Whatever may be the true rule on this subject in Great Britain and Ireland, none seems to have been settled at the time of our revolution.

If the effect of the assignment of a bankrupt's property rests on its being a judicial transfer, nothing but the principle of comity will require its being enforced elsewhere; and in such case, according to the decisions of the courts of Maryland, Pennsylvania, Connecticut and the United States, it must be subordinate to the claims of our own citizens, and of those whose legal diligence in our courts shall give them a priority. *Burk* v. *M'Clain*, 1 Har. & M'Hen. 236; *Wallace* v. *Patterson*, 2 Har. & M'Hen. 463; *Milne* v. *Moreton*, 6 Binn. 353; *Taylor* v. *Geary*, Kirby, 313; *Harrison* v. *Sterry*, 5 Cranch, 289.

But it is not perhaps of importance, in regard to the suit at bar, how the law may be settled respecting cases of transfer *inter vivos*. For the rights to inherit the property of deceased persons, and to bequeath by will, do not appear to be universally admitted as natural, but only as civil rights, and they must consequently depend on the law of each particular state. 1 Collect. Jurid. 323; Taylor's Civ. Law, 537. But by the law of England, and of our country, an alien may make a will, or if he dies intestate his personal property shall be distributed among his next of kin, according to the rules of his domicile. The case is then freed by positive law from the difficulties which might otherwise have arisen in considering it in connexion with these abstract principles.

We are therefore brought to what are presumed to be the main questions in this case: — Are these rights of succession and of bequeathing subordinate to the claims of creditors and of our own citizens? And can such claims be enforced in our courts of justice?

It is believed that no authority can be found which expressly maintains the negative of these inquiries. Reliance seems to be placed on deductions from the general principles before

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adverted to, but it is apprehended that they do not reach the case of debtor and creditor.

It may be well to observe, that there does not appear to have been established by the English courts, any distinction like that set up in *Dawes* v. *Boylston*, 9 Mass. R. 337, between principal and auxiliary administrations. 1 Gibson's Codex, 472, *in notis*; 1 Roll. Abr. 908; *Daniel* v. *Luker*, Dyer, 305, *pl.* 58; Cooper's Eq. Pl. 122; Wentw. Off. Exec. *c.* 11, *p.* 47. And in a late case in the House of Lords, on an appeal from Scotland, the jurisdiction of that court was not denied, when the residuary legatee sued an executor who had proved a counterpart of a will in India, the other parts of which had afterwards been proved by his co-executors in England. *Graham* v. *Kebbs*, 2 Dow, 17, and 2 Bligh, 127.

From that case it may be gathered, that the Court of Session will entertain jurisdiction on the ground that a party sued has property within the territory of Scotland, and that they will not remit a legatee to the *forum domicilii*, or to the tribunal of the country where the principal or original administration was granted.

This is in conformity with the principles laid down in *Harvey* v. *Richards*, 1 Mason, 407. And the whole reasoning of *Parsons* C. J., in *Goodwin* v. *Jones*, 3 Mass. R. 516, proceeds on the ground of the jurisdiction of our courts over the property here of deceased strangers. So in the case of *Gaylord* v. *Stevens*, 11 Mass. R. 269, this Court did not consider any contrary rule to be established by *Dawes* v. *Boylston*.

On the other hand, the current of opinion of different courts in the United States is strongly in favor of the jurisdiction, and that the claims of suitors here, and of our own citizens, who are creditors, shall be preferred. *Harrison* v. *Sterry*, 5 Cranch, 299; *Milne* v. *Moreton*, 6 Binn. 361; *Holmes* v. *Remsen*, 20 Johns. R. 265; *Goodwin* v. *Jones*, 3 Mass. R. 517, 523; *Selectmen of Boston* v. *Boylston*, 4 Mass. R. 324; *Richards* v. *Dutch*, 8 Mass. R. 515; *Dawes* v. *Boylston*, 9 Mass. R. 350, 356.

If the claims of creditors were more doubtful, the argu

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ment *ab inconvenienti* would justly have great weight against adopting the rule contended for by the defendants. Every country regulates the *order* of payment of the creditors, and charges the real or personal estate, or both, according to its own rules of policy and convenience. Equality is equity; and unless that be preserved throughout all countries as it regards the fund to be applied and the order of payment, injustice will be done. Besides, there can seldom be any reciprocity, even if our courts were disposed to remit their citizens to the foreign or original administrator for payment. Take, for example, the present case. The executor in India is governed by the laws of England; he therefore can prefer any one creditor *in equal degree*, to the exclusion of the others; he may pay himself in full; he must pay all debts due on judgments before those due on simple contract, and if a foreigner brings a judgment rendered in his own country, he is told that his claim is regarded by the English law merely as a debt by simple contract. Toller's Law of Exec. 267; 2 Fonbl. on Eq. 405, *bk.* 4, *pt.* 2. *c.* 2, § 2; *Walker* v. *Witter*, 1 Doug. 1; *Duplein* v. *De Roven*, Vern. 540. No more hardship therefore arises from the insufficiency of the property in India to pay the debts due there from Stewart, than there does from the inequality in the English mode of payment. *Philips* v. *Hunter*, 2 H. Bl. 412, 413.

Independently of this, another objection arises; in England the real estate is not chargeable with the debts; here every species of property is liable to them; so that the advantage would be clearly on one side. This is a sufficient reason for not applying the principles of comity; according to the 3d axiom of Huber, *part.* 2, *lib.* 1, *tit.* 3, *De Conflictu Legum*.

Argument for the defendants. The defendants contend, that the estate of Stewart should be settled according to the law in force in Bengal, which is the law of England, and that it is within the discretion of the Court, either to settle the estate here agreeably to such law, or to remit it to the proper tribunal for that purpose.

Personal property is subject to the law which governs the person of the owner: — a principle founded in the conven-

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ience and necessities of mankind, and adopted by so many nations as to give it the force and character of international law.

This is illustrated in various ways: — 1. The actual assignment of a debt or *chose in action* in another state or country, if valid by the law of the land where the assignor resides, is recognised and admitted in the state or country where the same is due, or happens to be, at the time of the assignment, as either a legal or equitable transfer of the property. See the citations in the note.*

2. All marriages which are not positively criminal are sustained, if valid in the country where they are solemnized, and by the contract of marriage the personal property passes to the husband, wheresoever the same may be situated.†

3. In the case of lunacy it was held, that a committee appointed in England might sue for and recover property in Scotland, equally as if there had been a voluntary assignment. *Morrison's case*, cited in *Thorne* v. *Watkins*, 2 Ves. sen. 37.

4. The distribution and disposition of personal property is governed by the *lex domicilii*, and not by the *lex loci rei sitæ*. This is well settled by many decisions of different tribunals in England,‡ and in this country,§ and is recognised by the

* *Solomons* v. *Ross*, 1 H. Bl. 131, note; *Jollet* v. *Deponthieu*, ibid. 132, note; *Holmes* v. *Remsen*, 4 Johns. Ch. R. 460, 476, 480; *Hunter* v. *Potts*, 4 T. R. 182; *Sill* v. *Worswick*, 1 H. Bl. 665; *Philips* v. *Hunter*, 2 H. Bl. 405; *Smith* v. *Buchanan*, 1 East, 11; *Bank of Scotland* v. *Cuthbert et al.* 1 Rose's Bankr. Cas. 462, 478; *Selkrig* v. *Davies*, 2 Rose's Bankr. Cas. 291 and 2 Dow, 230; *Neal* v. *Cottingham*, 1 H. Bl. 132, note; *Odwin* v. *Forbes*, 1 Buck's Bankr. Cas. 57; Cooper's Bankr. Law, 27, 30; *Bird* v. *Caritat*, 2 Johns. R. 345; *Goodwin* v. *Jones*, 3 Mass. R. 517.

† *Feaubert* v. *Turst*, Prec. Ch. 207; *S. C.* 1 Bro. Parl. Cas. 38 (2nd ed. p. 129); *Medway* v. *Needham*, 16 Mass. R. 157; *Holmes* v. *Remsen*, 4 Johns. Ch. R. 472; *Bank of Scotland* v. *Cuthbert*, 1 Rose's Bankr. Cas. 481.

‡ *Potter* v. *Brown*, 5 East, 124; *Pipon* v. *Pipon*, Amb. 25; *Burn* v. *Cole*, ibid. 415; *Thorne* v. *Watkins*, 2 Ves. sen. 35; *Bruce* v. *Bruce*, 2 Bos. & Pul 229, note; *Sill* v. *Worswick*, 1 H. Bl. 665; *Philips* v. *Hunter*, 2 H. Bl. 402, *Hunter* v. *Potts*, 4 T. R. 182; *Bempde* v. *Johnstone*, 3 Ves. jun. 198; *Somerville* v. *Somerville*, 5 Ves. jun. 750; *Balfour* v. *Scott*, 6 Bro. Parl. Cas. 550; *Hog* v. *Lashley*, ibid. 577; *Kilpatrick* v. *Kilpatrick*, ibid. 584; *Drummond* v. *Drummond*, ibid. 601; Toller's Law of Ex. (3d ed.) 387.

§ *Desesbats* v. *Berquier*, 1 Binn. 336; *Guier* v. *O'Daniel*, ibid. 349, note

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writers on the civil law and the law of nations ;* as will appear by the citations in the notes.

5. Contracts made in foreign states, and to be there executed, if valid by the laws of such states, are valid in every other state, and in accordance with this principle the courts of other states continually give effect to such contracts, so far as the remedies provided by their laws will possibly permit.†

From these positions it follows conclusively, that personal property, the conveyance, disposition, and distribution of it, and the contracts and instruments relating to it, are governed by the law of the owner's domicile ; which law other states, when required to act judicially thereon, are bound to respect and enforce. To this rule there appears to have been advanced but three exceptions : — 1. Where the contract entered into by the foreigner is made with reference to a country, other than that in which the foreigner is domiciled, and to be executed there : — 2. Where the contract cannot be executed without a direct violation of some positive law of the country where the execution is sought to be enforced : — and, 3. Where the citizen of a state, in which the contract is sought to be enforced, will sustain an injury by giving the contract or foreign laws effect.

Without considering in this place the bearing of either of these exceptions, it may be laid down as the general rule of law, deduced from the foregoing authorities, that the personal estate and effects of a foreign bankrupt living, and of a foreign

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Dixon's Exec. v. *Ramsay's Exec.* 3 Cranch, 319; *Harvey* v. *Richards*, 1 Mason, 381 ; *Holmes* v. *Remsen*, 4 Johns. Ch. R. 460; *Richards* v. *Dutch*, 8 Mass. R. 515; *Dawes* v. *Boylston*, 9 Mass. R. 355.

* Voet, *lib.* 38, *tit.* 17, § 34; Denisart, Collection, &c., *voc. Domicile*, § 3, 4; Vinnii Quæst. Select. *lib.* 2, *c.* 19; Bynk. Quæst. Jur. Priv. *lib.* 1, *c.* 16; Huber. Prælect. *part.* 1, *lib.* 3, *tit.* 13, § 21; ibid. *part* 2, *lib.* 1, *tit.* 3, § 15; 3 Dallas, 377 ; Heinec. *De Testamentifactione, tom.* 2 (ed. 1746, 4to.), *p.* 971, § 30; Lord Kaimes's Princ. Eq. *bk.* 3, *c.* 8, § 4; Ersk. Inst. *bk.* 3, *tit.* 9, § 4; 1 Collect. Jurid. 324, 329; Vattel, *liv.* 2, § 85, 109, 110.

† *Robinson* v. *Bland*, 2 Burr. 1080; *Holman* v. *Johnson*, Cowp. 343; *Mostyn* v. *Fabrigas*, ibid. 175; *Smith* v. *Buchanan*, 1 East, 6; *Melan* v. *Fitzjames*, 1 Bos. & Pul. 138; 2 Fonbl. 443, *bk.* 5, *c.* 1, § 6; 3 Dallas. 370; Huber. *part.* 2, *lib.* 1, *tit.* 3, § 7, *et seq.*; *Pearsall* v. *Dwight*, 2 Mass. R. 84; *Barrell* v. *Benjamin*, 15 Mass. R. 357; *Greenwood* v. *Curtis*, 6 Mass. R 377

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solvent person dead, are to be governed by the laws of their domicile; and it results as a necessary consequence, that the personal estate and effects of a foreign insolvent person dead, are to be subjected to the same rule; for the rule is not founded on the incidental circumstance of solvency or insolvency, but on the broad principle, that personal property is subject to the law which governs the person of the owner; whose rights are respected, and whose duties are enjoined, as well after death as in full life: a principle enforced by national comity, which is acquiring new efficacy and vigor in the enlightened and enlarged policy that now pervades the judicial tribunals of the civilized world.

If the above conclusion is correctly drawn, the defendants have committed no breach of duty; on the other hand, the administrator is entitled, in the proper court, to a decree, either directing the disposition and settlement of the estate according to the foreign laws, or ordering him to remit the property to the foreign executor for such settlement. And what reasonable objection can there be to such a course? Whose rights will be violated? What known and acknowledged rule of law be infringed?

But it is asserted, that as the property and the representative of the deceased are here, and as our courts have from the first settlement of the country sustained jurisdiction in cases where either the person or the property was here, the Court is therefore bound in this case to render judgment for the plaintiff. To this it is replied, that it has not been the unvaried practice of our courts to sustain actions, where the property only of a foreigner, and not his person, has been within their jurisdiction; *Robertson* v. *Kerr*, 3 Mass. R. 25, note; and it is also suggested, that the citation from Anc. Chart. 50, relates entirely to citizens of the colony who should be absent from their homes.

It is admitted, however, in this case, that the administrator is, for certain purposes, the representative of the deceased foreigner; and also that the judicial proceedings for obtaining possession of the property of the deceased must be regulated exclusively by the laws of this commonwealth; wherefore the defendants contend, that it is not a question of jurisdiction, in

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which the rights of territorial sovereignty are involved, which the Court are to determine, but it is a rule of interpretation and decision only which they are to make, and which rule is to be enforced in conformity to those principles of international law before mentioned. *Dixon's Exec.* v. *Ramsay's Exec.* 3 Cranch, 324.

The plaintiff also contends, that this Court, having jurisdiction, ought to enforce payment of the demands of creditors, upon the ground of positive law; and he relies on *St.* 1785, *c.* 12, § 1. This statute was not made with reference to insolvent estates. It relates to wills proved out of the State, and authorizes the granting of administrations ancillary to those where the original wills have been proved. It provides no new rules of distribution, nor is there any new provision on the subject of debts, and the bond itself does not in terms require their payment. The condition is that the administrator shall truly administer according to law, without saying what that law is. We say it is the law of the testator's domicile. In relation to the debts of a deceased solvent person no question like the present can arise. Neither does the statute of 1784, *c.* 2, for "the distribution of insolvent estates," relieve the case from embarrassment on the part of the plaintiff. That statute relates especially, if not exclusively, to citizens of this commonwealth, and to estates to be settled here, and not to estates of which the administrations are merely ancillary to foreign administrations. The administration in the case at bar is strictly ancillary. *Stevens* v. *Gaylord*, 11 Mass. R. 263

It is said, however, that the rights of succession and of bequeathing are subordinate to the claims of creditors and of our own citizens, and therefore the plaintiff ought to prevail; but it is to be observed, that notwithstanding the elaborate research of the plaintiff's counsel, not a case has been found in which such a claim as the present has been sustained. Many cases have been cited in which respectable judges have thrown out *dicta* to that effect, but they are expressed by way of caution to exclude conclusions, rather then to settle principles In truth they can hardly be said to discuss them. (See the cases cited from Har. & M'Hen. and compare *Harrison*

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Sterry, 5 Cranch, 299, and *Milne* v. *Moreton*, 6 Binn. 361, with *Dixon's Exec.* v. *Ramsay's Exec.* 3 Cranch, 324, and *Holmes* v. *Remsen*, 4 Johns. Ch. Rep. 488.) In the cases of *Selectmen &c.* v. *Boylston*, 4 Mass. R. 324, *Richards* v. *Dutch*, 8 Mass. R. 515, and *Dawes* v. *Boylston*, 9 Mass. R. 355, in which it is intimated that the ancillary administrator may be held to pay debts due to creditors, the point did not arise, whether he was liable under circumstances like the present. No question of insolvency was started; the statute was not analyzed; and the reasons which in *Richards* v. *Dutch* led the Court to refer the legatee to the foreign tribunal, are still stronger in the case of a creditor. The statute furnishes no reason for the qualification in favor of creditors; there is no series of precedents to sanction it; there is nothing to be drawn from the argument *ab inconvenienti* which does not apply with equal force to a creditor as to a legatee; national comity will surely respect the rights of a legatee with as much vigilance as those of a creditor. To establish the claims of the plaintiff, as a general rule of law, will lead to manifold inconveniences, and in many cases to great injustice. *Harvey* v. *Richards*, 1 Mason, 421, 423.

As it regards the inequality arising from the marshalling of assets, there is no practical injustice in thus referring the domestic creditor to the foreign tribunal, for in entering into contracts with foreigners he well understands that he incurs the risk of seeking his debt in a foreign land, and indeed the very course of his dealing will lead him in most cases to prefer his claim where his debtor is domiciled; and if property happens to be found where the creditor lives, then if the property is remitted, such claim will be remitted with it, or if a settlement is ordered, where the property is found, according to the foreign law, then the claimant on the spot will at least stand with every advantage over absent creditors for enforcing his claim.

With respect to the exception, that the *lex domicilii* is not to govern where citizens may sustain an injury by giving the foreign laws effect, it may be asked, is this exception founded on the principles of natural justice? Is not the true rule this,

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that each nation shall lend the aid of its tribunals for the purpose of enforcing the rights of all persons having title to the fund, and not use those tribunals as mere instruments to secure the claims of its own citizens, without regard to the rights of others? And though different remedies may be afforded by different countries, and therefore some claims may be preferred to others, yet it is not our province to seek to remove such inequalities by adopting arbitrary rules of our own with regard to foreigners. It is our true policy to administer equal and impartial justice between them and our own citizens, on the principle of an international law, and thus exhibit the wisdom of our government and the integrity of our courts, and hold forth an unerring example for other nations to follow.

But the Court are not called upon to decide the question as it regards our own citizens. Bruce, it is agreed, is a foreigner, and though Sheafe and Lenox are citizens of the United States, the defendants contend that they are not thereby virtually citizens of this State. *Bissell* v. *Briggs*, 9 Mass. R. 464; *Pearsall* v. *Dwight*, 2 Mass. R. 89; *Greenwood* v. *Curtis*, 6 Mass. R. 380; *Stevens* v. *Gaylord*, 11 Mass. R. 269.

The defendants believe, on the authority of *Stevens* v. *Gaylord* and *Harvey* v. *Richards*, that it is in the discretion of the Court, either in this present case, or upon a direct appeal from the court of probate, to decree a distribution here according to the *lex domicilii*, or to direct the property to be transmitted for distribution by the executor in Calcutta, according as the interest of the estate shall require.

PARKER C. J. We are satisfied, that the facts appearing in these pleadings show no breach of the condition of the bond. *Jan. 14th, 1826.*

The administration was granted here upon a copy of a will previously proved in a foreign country, in which an executor was appointed, who became duly qualified to act as such in the country where the will was proved. The testator had his domicile there at the time of his death, and the effects collected here are wanted there to enable the executor to pay the creditors of the deceased, his estate being in fact insolvent. The administration here is therefore purely ancillary, and the admin-

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istrator here is only the deputy or agent of the executor abroad;[1] so that whatever effects he may have collected here are to be sent to the foreign executor, unless by virtue of our laws he is compellable to appropriate those effects to the payment of debts which may be due to citizens of this commonwealth or of the United States. This is an important question, which it is not necessary to decide in this action, because, admitting such to be the duty of the administrator, the creditors, at whose instance this action is instituted, have not brought themselves within the principles which alone can sustain a suit upon the probate bond. In order to sustain the action for the benefit of a creditor, if the estate be solvent, the debt must have been ascertained by a judgment of court, after which there must have been a demand of satisfaction upon the administrator. If the estate be insolvent, the debt must have been ascertained by commissioners appointed by the judge of probate, who thereupon shall have made his decree of distribution, on which a demand must likewise have been made upon the administrator by the creditor who would cause the bond to be sued.[1] In relation to the debt of Lenox and Sheafe, no judgment has been recovered, and yet the estate administered upon is treated as solvent, for the judge has decreed payment of the whole sum due. His decree in this respect is a nullity, and the non-performance of it is no breach of the bond. If the estate were solvent, then the administrator would pay on demand without any decree; if he did not, a suit might be brought and the goods and estate of the deceased taken in execution, or a suit might then be brought upon the bond; for it is only after such a process that the sureties on the bond are responsible. The recovery of a judgment, when the estate is not insolvent, is made by the statute a condition precedent to a suit on the administration bond.[2]

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[1] *Harvey* v. *Richards*, 1 Mason, 381; *Stevens* v. *Gaylord*, 11 Mass. R. 256; *Case of Miller's estate*, 3 Rawle, 312; *Potter* v. *Titcomb*, 7 Greenl. 316; *Campbell* v. *Sheldon*, 13 Pick. 8.

[1] Revised Stat. *c.* 70, § 4.

[2] Revised Stat. *c.* 70, § 3. See *Newcomb* v. *Wing*, *post*, 170, note 1; *Ring* v. *Burton*, 5 Greenl. 45; *Potter* v. *Titcomb*, 7 Greenl. 302; *Judge of Probate* v. *Briggs*, 5 N. Hamp. R. 66; *Coffin* v. *Jones*, 5 Pick. 61; *Dawes* v. *Swett*, 14 Mass. R. 105; *Prescott* v. *Parker*, 14 Mass. R. 429.

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Neither is the non-payment of the debt of Bruce a forfeiture of the bond. The decree of the judge of probate respecting this debt is void, for the reason before stated, that it awards payment of the whole debt on the ground that the effects in the hands of the administrator were sufficient to pay all the debts, that is, that the estate was solvent; which, if true, shows that the judge of probate had no authority to make a decree respecting it. 143 But this debt was rejected by the commissioners, a suit has been brought upon it, and judgment recovered, and we will suppose that a demand has been made upon the administrator, though this fact is not stated; nevertheless we think there is no forfeiture of the bond. Bruce, the creditor, is a British subject, and had, at the time when the suit was commenced, and now has, his domicile in London in the kingdom of Great Britain. Though the debt of the deceased to him may have been contracted here, it must be referred to the laws of the country of the debtor for settlement; and it ought not to be in the power of a British subject to disturb the legal course of settlement of an estate, by claiming payment in whole, of the mere ancillary administrator in a foreign country, when by means thereof all the other creditors may be greatly injured. The fact appearing in the pleadings, that the estate of the deceased is *insolvent*, and that the administration granted here is not original but ancillary, it is the duty of the administrator here to remit all the effects which he may collect, to his principal, unless our own citizens may be creditors and the funds should be retained for their use. Bruce is not in that condition, but is subject entirely to the laws of Great Britain, and should not be allowed to intercept the due course of administration in his own country. For these reasons we think the non-payment of his debt, though ascertained by a judgment, is no breach of the condition of the administration bond.

Thus this action is determined without touching the questions upon which it was supposed it would turn, which are of a novel and delicate nature, and though often glanced at, do not appear to have been decided either in this or any other State

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of the Union. We wish to avoid any thing which may be construed into a conclusive adjudication, and yet are of opinion that it will be useful to throw out for consideration the results of our reasonings upon this subject.

If the technical difficulties upon which this cause has been decided had not occurred, but the estate had been rendered insolvent here, and a decree of distribution for a proportion had been issued, or if the debt of Lenox and Sheafe had
144 been ascertained by a judgment, and the pleadings to a suit on the bond had been the same in that case as now, the question would be, whether the funds collected here by an ancillary administration should be appropriated to the payment of such debts as might be regularly proved here, notwithstanding it was made to appear that the whole estate was insufficient to pay all the debts, and that the effects here were wanted by the executor abroad, to enable him duly to administer the estate. It has been contended that this should be done, because the administrator has given bond here in the same manner as if this were the original administration, and because the statute which authorizes this administration, requires that the judge of probate shall settle the estate in the same way and manner as he would if the original will had been proved here. With respect to the bond, it will be saved by a faithful administration of the estate according to law; and with respect to the settlement by the judge of probate, this must be understood to authorize him to require the administrator to account, and that the due course of proceedings in the probate office shall be observed. It certainly cannot be construed to mean that in all cases a final settlement of the estate shall take place here; if it did, then if there were no debts here, and none to claim as legatees or next of kin, it would be necessary for all such to prove their right and receive their distributive shares here, notwithstanding the settlement must in such case be made according to the laws of the country where the deceased had his domicile. But we think in such case it would be very clear, that the assets collected here should be remitted to the foreign executor or administrator; for it seems to be a well settled principle, that

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the distribution is to be made according to the laws of the country where the deceased was domiciled ;[1] and if any part is to be retained for distribution here, it will be only by virtue of some exception to this general rule, or because the parties interested seek their remedy here ; in which case it might be within the legal discretion of the court here to cause distribution, or to remit, according to the circumstances and condition of the estate.[2]

An exception to the general rule grows out of the duty of every government and its courts, to protect its own citizens in the enjoyment of their property and the recovery of their debts, so far as this may be done without violating the equal rights of creditors living in a foreign country. In relation to the effects found within our jurisdiction and collected by the aid of our laws, a regard to the rights and interests of our citizens requires that those effects should be made answerable for debts due them, in a just proportion to the whole estate of the deceased and all the claims upon it wherever they may be. In the several cases which have come before this Court, where the legal character and effects of an ancillary administration have been considered, the intimations have been strong, that the administrator here shall be held to pay the debts due to our citizens. The cases *Richards* v. *Dutch*, *Dawes, Judge &c.* v. *Boylston*, *Selectmen of Boston* v. *Boylston*, and *Stevens* v. *Gaylord*, are of this character. In all these cases, however, we must suppose the Court had reference to a solvent estate, and in such case there seems to be no question of the correctness of the principle ; for it would be but an idle show of courtesy to order the proceeds of an estate to be sent to a foreign country, the province of Bengal for instance, and oblige our citizens to go or send

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[1] *Pipon* v. *Pipon*, Ambler, 25; *Bruce* v. *Bruce*, 2 Bos. & Pul. 229, note; *Olivier* v. *Townes*, 14 Martin, 99; *Shultz* v. *Pulver*, 3 Paige, 182; *De Sobry* v. *De Laistre*, 2 Harr. & Johns 193, 224, 228; *Holmes* v. *Remsen*, 4 Johns. Ch. R. 460; *S. C.* 20 Johns. R. 229; *Vattel*, *bk.* 2, § 85, 103, 110, 111; *Harvey* v. *Richards*, 1 Mason, 418; Story on Conflict of Laws, 403 *et seq.*; *Jennison* v. *Hapgood*, 10 Pick. 100; *Decouche* v. *Savetier*, 3 Johns. Ch. R. 190; *Guier* v. *O'Daniel*, 1 Binn. 349; *Williamson* v. *Smart*, Taylor, 219; Cameron & Norw. 146.

[2] See *Jennison* v. *Hapgood*, 10 Pick 100; 1 Story on Equity, 552.

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Dawes, Judge &c. v. Head.

there for their debts, when no possible prejudice could arise to the estate, or those interested in it, by causing them to be paid here; and possibly the same remark may be applicable to legacies payable to legatees living here, unless the circumstances of the estate should require the funds to be sent abroad. Whether citizens of other States claiming payment of their debts of the administrator here, are to be put upon the same footing with citizens of Massachusetts, by virtue of the privileges and immunities secured to them by the constitution of the United States, is a point which we do not now decide. But without doubt the courts of the United States, having full equity powers, would enforce payment upon the principles above stated, where there is no suggestion of insolvency of the estate. There would be no doubt, we think, that payment of debts by the administrator here, after sufficient proof that
146 they were due and an allowance of his account therefor by the probate court with proper notice, would be faithful administration according to the condition of his bond, and would be a proper way of accounting to the principal administrator abroad.

In regard to effects thus collected within our jurisdiction, belonging to an insolvent estate of a deceased person having his domicile abroad, the question may be more difficult. We cannot think, however, that in any civilized country advantage ought to be taken of the accidental circumstance of property being found within its territory, which may be reduced to possession by the aid of its courts and laws, to sequester the whole for the use of its own subjects or citizens, where it shall be known that all the estate and effects of the deceased are insufficient to pay his just debts. Such a doctrine would be derogatory to the character of any government. Under the English bankrupt system, foreigners as well as subjects may prove their debts and share in the distribution. Without doubt, in other foreign countries where there is a *cessio bonorum*, or other process relating to bankrupts' estates, the same just principle is adopted. It was so under our bankrupt law while that was in force, and no reason can be suggested why so honest and just a principle should not be applied in the case of insolvent estates of deceased persons. It is always

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practised upon in regard to persons dying within our jurisdiction, having had their domicile here; that is, creditors of all countries have the same right as our own citizens, to file their claims and share in the distribution. There cannot be then a right in any one or more of our citizens, who may happen to be creditors, to seize the whole of the effects which may be found here, or claim an appropriation of them to the payment of their debts, in exclusion of foreign creditors.

It is said this is no more than what may be done by virtue of our attachment law, in regard to the property of a living debtor who is insolvent. But the justness of that law is very questionable, and its application ought not to be extended to cases, by analogy, which do not come within its express provisions.

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What then is to be done with the effects collected here belonging to an insolvent estate in a foreign country? Shall they be sent home in order to be appropriated according to the laws of that country? This would often work great injustice, and always great inconvenience, to our own citizens, whose debts might not be large enough to bear the expense of proving and collecting them abroad; and in countries where there is no provision for an equal distribution the pursuit of them might be wholly fruitless. As in Great Britain, our citizens, whose debts would generally be upon simple contract, such as bills of exchange, promissory notes, accounts, &c. would be postponed to creditors by judgment, bond, &c., and even to other debts upon simple contract which might be preferred by the executor or administrator. It would seem too great a stretch of courtesy to require the effects to be sent home and our citizens to pursue them under such disadvantages. What then shall be done to avoid, on the one hand, the injustice of taking the whole funds for the use of our citizens to the prejudice of foreigners, when the estate is insolvent, and on the other, the equal injustice and greater inconvenience of compelling our own citizens to seek satisfaction of their debts in distant countries?

The proper course would undoubtedly be, to retain the funds here for a *pro ratâ* distribution according to the laws of our State among the citizens thereof, having regard to all the assets,

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either in the hands of the principal administrator or of the administrator here, and having regard also to the whole of the debts which by the laws of either country are payable out of those assets, disregarding any fanciful preference which may be given to one species of debt over another, considering the funds here as applicable to the payment of the just proportion due to our own citizens; and if there be any residue, it should be remitted to the principal administrator, to be dealt with according to the laws of his own country, the subjects of that country, if there be any injustice or inequality in the payment or distribution, being bound to submit to its laws.[1] The only objection which can be made to this mode of adjusting an ancillary administration upon an insolvent estate, is, the difficulty 148 and delay of executing it. The difficulty would not be greater than in settling many other complicated affairs, where many persons have interests of different kinds in the same funds. The powers of a court of chancery are competent to embrace and settle all cases of that nature, even if the powers of our court of probate are not sufficiently extensive; which however is not certain. The administrator here should be held to show the condition of the estate abroad, the amount of property subject to debts, and the amount of debts, and a distribution could be made upon perfectly fair and equitable principles. The delay would undoubtedly be considerable, but this would not be so great an evil as either sending our citizens abroad, upon a forlorn hope, to seek for the fragments of an insolvent estate, or paying the whole of their debts out of the property without regard to the claims of foreign creditors. And if the probate court has not sufficient power to make

[1] *Davis* v. *Estey*, 8 Pick. 475; *Harvey* v. *Richards*, 1 Mason, 381; *Jennison* v. *Hapgood*, 10 Pick. 77; *Case of Miller's estate*, 3 Rawle, 312; *Hooker* v. *Olmstead*, 6 Pick. 481; *Richards* v. *Dutch*, 8 Mass. R. 506; *Harrison* v. *Sterry*, 5 Cranch, 299; *Milne* v. *Moreton*, 6 Binn. 353, 361; *Olivier* v. *Townes* 14 Martin, 93, 99; *De Sobry* v. *De Laistre*, 5 Harr. & Johns. 193, 224; *Holmes* v. *Remsen*, 20 Johns. R. 265; *Decouche* v. *Savetier*, 3 Johns. Ch. R. 190; Wms. on Executors, 908; Story on Conflict of Laws, 423; 2 Kent's Comm. (2d edit) 433, 434.

In this State, by the Revised Statutes it is enacted, that the estate of a deceased person, insolvent, shall, as far as practicable, be so disposed of, that all his creditors, here and elsewhere, may receive each an equal share, in proportion to their respective debts. Revised Stat. c. 70, § 23

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such an equitable adjustment, a bill in equity, in which the administrator here should be the principal respondent, would probably produce the desired result, as then time and opportunity could be given to make known the whole condition of the estate, and all persons interested might be heard before any final decree; in the mean time the administrator could be restrained from remitting the funds until such decree should be passed.

Rejoinder adjudged good.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF BERKSHIRE, SEPTEMBER TERM 1825, AT LENOX.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, }
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON, }

ALEXANDER M'MECHAN *versus* MARTIN GRIFFING.

Implied notice of a prior unregistered deed, to avoid a subsequent deed or attachment, must be not merely a probable, but a necessary and unquestionable, inference from the facts proved.

Such inference cannot in all cases be made from an open, peaceable, and exclusive possession. Thus, where a person owning and in possession of part of a lot of land not divided by any partition fence, purchased the residue, consisting principally of woodland and which had not been occupied by the grantor, repaired the fence round the lot, depastured cattle in it, sold trees from the part purchased, and removed an old hovel standing on the same part, it was *held*, that these facts did not imply notice.

Whether if the evidence of possession be such as to raise a legal presumption of notice, such presumption may not be rebutted by other evidence, *quære*.

ENTRY *sur disseisin*. Trial upon the general issue.

The demandant derived his title under an attachment of the land, on the 6th of May, 1822, as the estate of one Timothy Griffing, and a subsequent levy.

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The tenant, to defeat this title, relied upon a title in himself previously acquired from the same Timothy Griffing. He proved that on the 20th of September, 1820, his father died seised of the premises demanded, together with other real estate, leaving five children, of whom Timothy was one; that on the 9th of May, 1821, the children made an amicable division of the estate which had descended to them, executing to each other deeds of quitclaim, and that upon this division the Tracy lot, so called, fell to the shares of Timothy and the tenant in severalty, divided by a line, the north part being assigned to Timothy, and the south to the tenant; and that on the same day Timothy conveyed to him by deed, for a valuable consideration, the north part of the Tracy lot, which includes the demanded premises. This deed was not recorded until the 2d of July, 1822, but the tenant alleged, that immediately upon the execution of it he entered upon the land thereby conveyed, and that from that time to the time of the attachment he had continued in open, peaceable, and exclusive possession.

On this point *H. W. Bishop* testified, that on the 9th of May the heirs before mentioned met together for the purpose of dividing the inheritance; that some of the neighbours assisted them in making the division; that after this was agreed upon the tenant bargained with Timothy for the land which was assigned to his share, and that Timothy at the same time gave a deed of it to the tenant; that these transactions took place in the presence of a great many people and were the subject of their conversation. *Henry Griffing*, a brother of the tenant, testified that he lived with the tenant in May, 1821, and ever since; that immediately after the tenant had bought the land of Timothy he was sent by the former to mend the fence about the lot; that he drove the tenant's cattle to pasture on the lot through the whole summer of 1821; that the tenant took some sheep of Harvey Griffing to pasture; that to his knowledge no other person than the tenant had or claimed to have any occupation of the lot or any part of it; that in the course of the summer the tenant sold some chestnut timber for posts to one Williams, the most of which was cut from that part of the lot which Timothy conveyed to the tenant, and

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was cut by direction of the tenant; that there was an old hove. which covered a saw for sawing wood on that part of the lot, which was taken down and removed by order of the tenant; and that the tenant got all his winter's wood from the lot, and principally from the part conveyed by Timothy. *A. Rosseter* testified, that in the summer of 1821 he bought of the tenant, upon a contract made with Henry Griffing, five trees, three of which stood on that part of the land which had been conveyed by Timothy, and that he cut and carried off the trees and paid the tenant for them; that he lived in the neighborhood and did not know of the occupation of the whole lot by any other person than the tenant after May, 1821. *E. Williams* testified that he applied to the tenant for the chestnut timber before mentioned, because he knew that he owned the lot. *J. Chittenden* testified, that to his knowledge the tenant had improved the land ever since the deed was made, and no one else; and that his possession was as open and notorious as that of any man in the neighbourhood.

The demandant produced evidence, which it is unnecessary to detail, to show that when he attached the land he had not in fact notice of the prior conveyance, and that the land was situated remote from observation.

It was agreed that the land conveyed was not divided by any fence from the residue of the lot which had been assigned as the share of the tenant, and that by far the greater portion of the pasture land was on this latter part, the former being principally woodland; that after the conveyance Timothy returned to the State of New York, where he had previously resided, and that he never claimed the possession, or any profits of the land, from the date of his conveyance.

The only question at the trial was, whether there was implied notice to the demandant of the unregistered deed; as to which *Lincoln* J. instructed the jury that the burden of proof was on the tenant; that if they were satisfied that the tenant entered immediately upon the demanded premises under the deed, and continued his possession thereof openly, peaceably, exclusively, and in the only manner in which the premises could be possessed and improved by the rightful owner, from the time of the execution of the deed to the time of the

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demandant's attachment, it was in law notice equivalent to the registry of the deed, and they might find the issue for the tenant; but if they were not so satisfied, they might find for the demandant.

No objection was made to this instruction, but a verdict being returned in favor of the tenant, the demandant moved for a new trial, and the judge consented to report the case for the consideration of the whole Court, upon such objections as might be made to the trial.

Sept. 21st, 1824.

E. H. Mills and *Dewey*, in support of the motion, contended that the instruction to the jury was incorrect, for that open, peaceable, and exclusive possession was not in all cases notice equivalent to a registry of the deed, and was not so in the present instance. They said that the words of the statute were general, that no unrecorded conveyance of land shall be effectual against any other person than the grantor and his heirs, but that the Court had made some exceptions, on the ground of fraud, where a subsequent purchaser or attaching creditor had notice of the first deed, and they distinguished this case from those in which such exceptions had been made; contending, that if any thing less than actual notice would avoid the demandant's attachment, which had never been expressly decided, though there were *dicta* to that effect, yet notice could not be implied from the facts proved in this case. They referred to *Priest* v. *Rice*, 1 Pick. 164; *Doe* v. *Routledge*, Cowp. 712; *Wyatt* v. *Barwell*, 19 Ves. jun. 456; *Doe* v. *Allsop*, 5 Barn. & Ald. 142; Sugd. Vend. 511; and the cases hereafter cited in the opinion of the Court.

Jarvis, *contrà*, relied on 3 Mass. R. 573; *Prescott* v *Heard*, 10 Mass. R. 60; and *Davis* v. *Blunt*, 6 Mass. R 487.

Sept. 22nd, 1825.

Wilde J. delivered the opinion of the Court. By the provincial statute of 9 *Will.* 3, *c.* 7, it is provided that no bargain, sale, mortgage, or other conveyance of houses or lands, made and executed within this province, shall be good and effectual in law to hold such houses or lands against any person or persons, but the grantor or grantors, and their heirs only, unless the deed or deeds thereof be acknowledged and recorded.

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A provision nearly similar is contained in *St.* 1783, *c.* 37, directing the mode of transferring real estates by deed, and for preventing fraud therein.

It is said that it was formerly held by some, that under the provincial statute the estate did not pass until the registry of the deed, but it was at an early period determined, and has long since been settled as undisputed law, that the estate, as between the parties, passed immediately on the delivery of the deed; and that when recorded, the deed was rendered valid from the beginning, by relation back, to all intents and purposes, unless the grantor, in the mean time, should have conveyed the estate to a subsequent *bonâ fide* purchaser, or it should have been attached or otherwise encumbered as his property. It was also determined, and it is equally well settled as the sound construction of the statute, that as the registry was designed only to give notice, and thereby to prevent purchasers being imposed upon by prior conveyances, any notice of the first conveyance, to a subsequent purchaser, before his purchase, is equivalent to the registry of the deed. *Trowbridge's Reading on the Statute*, 3 Mass. R. 573. If the subsequent purchaser thus affected with notice should nevertheless complete his purchase, intending to get his deed recorded before the first purchaser, and thereby to hold the estate, it would be a manifest fraud upon the first purchaser, and therefore void as to him. "Valid transactions, as between the parties," says Lord *Mansfield*, "may be fraudulent by reason of covin, collusion, or confederacy to injure a third person: for instance, A buys an estate from B and forgets to register his purchase deeds; if C, with express or implied notice of this, buys the estate for a full price, and gets his deeds registered, this is fraudulent, because he assists B to injure A." *Worseley* v. *De Mattos*, 1 Burr. 474. C's deed, in the case supposed, being fraudulent, cannot be set up against A, who afterwards gets his deed recorded, without supposing, what can never be supposed, that the statute was intended to sanction
154 fraud. In the case of *Le Neve* v. *Le Neve*, Lord *Hardwicke* says, "that the taking of a legal estate after notice of a prior right, makes a person a *malâ fide* purchaser. This is a species of fraud, and *dolus malus* itself; for he knew that the first

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purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate. And this exactly agrees with the definition of the civil law of *dolus malus*. Dig. *lib.* 4, *tit.* 3, *lex*, 2. Fraud, or *mala fides*, therefore, is the true ground on which the court is governed in cases of notice." 3 Atk. 654.

On this ground numerous cases have been decided, both in this country and in England; and the principle is too well supported by authority, and too clear, to admit a reasonable doubt. *Jackson* v. *Sharp*, 9 Johns. R. 168; *Farnsworth* v. *Childs*, 4 Mass. R. 637; *Norcross* v. *Widgery*, 2 Mass. R. 506; *Davis* v. *Blunt*, 6 Mass. R. 489; *Prescott* v. *Heard*, 10 Mass. R. 60; *Jackson* v. *Burgott*, 10 Johns. R. 457; *Dey* v. *Dunham*, 2 Johns. Ch. R. 190.[1]

To determine what notice is sufficient to supply the place of a prior registry, is more difficult. The notice, say the authorities, must be either express or implied. As to express notice, it has been uniformly held, that the proof must be clear and unequivocal. "Suspicion of notice, though a strong suspicion," says Lord *Hardwicke*, in the case of *Hine* v. *Dodd*, 2 Atk. 275, "is not sufficient to justify the court in breaking in upon an act of parliament." In that case, which depended upon the Registry Act, (7 *Anne*, *c.* 20,) there was proof that the defendant acknowledged notice of the plaintiff's judgment prior to the execution of the mortgage set up by the defendant, but as he in his answer swore to his belief that he had not

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[1] See also *Beers* v. *Hawley*, 2 Connect. R. 467; *Beers* v. *Brooms*, 4 Connect. R. 248; *French* v. *Gray*, 2 Connect. R. 92; *Guerrant* v. *Anderson*, 4 Randolph, 208; *Root* v. *Holliday*, 6 Munf. 251; *Newman* v. *Chapman*, 2 Randolph, 73; *Levins* v. *Will*, 1 Dallas, 435; *Burke* v. *Allen*, 3 Yeates, 360; *Heister* v. *Fortner*, 2 Binn. 40; *Henry* v. *Morgan*, 2 Binn. 497; *Keller* v *Nutz*, 5 Serg. & Rawle, 246; *Semple* v. *Burd*, 7 Serg. & Rawle, 286; *Muse* v. *Letterman*, 13 Serg. & Rawle, 167; *Dunham* v. *Day*, 15 Johns. R. 555, *Beekman* v. *Frost*, 18 Johns. R. 544; *Ex parte Stagg*, 1 Nott & M'Cord, 405; *Taylor* v. *Herriott*, 4 Desaus. 227; *Cowan* v. *Green*, 2 Hawks, 354; *Davidson* v. *Beard*, 2 Hawks, 520; *Cushing* v. *Hurd*, 4 Pick. 253; *Warden* v. *Adams*, 15 Mass. R. 233; *Trull* v. *Bigelow*, 16 Mass. R. 406; *Newhall* v. *Burt*, 7 Pick. 157; *Hurd* v. *Cushing*, 7 Pick. 169; *Lambert* v. *Nanny*, 2 Munf. 196; *Hoover* v. *Donally*, 3 Hen. & Munf. 316.

But see *Robinson* v. *Allsop*, 5 Barn. & Ald. 142; *M'Neil* v. *Cohill*, 2 Bligh, 228

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notice, the proof was held to be insufficient. So in the case of *Jackson* v. *Given et al.* 8 Johns. R. 107, it was proved that Williams, under whom the defendants claimed, had said, in a conversation with a third person, about the time of the purchase, that "he had understood that Umphrey [his grantor] had fooled away the lot, and had sold it several times, and did not consider it worth his trouble to look about it." And it
155 was decided that this conversation was too loose to justify the inference of notice. Chief Justice *Kent* cites with approbation the decision of Lord *Hardwicke* in the case of *Hine* v. *Dodd*; and the same is much approved of likewise in the case of *Jolland* v. *Stainbridge*, 3 Ves. jun. 478. In the case of *Norcross* v. *Widgery*, Chief Justice *Parsons* says, that "when a prior conveyance, not recorded until after one of a subsequent date, is attempted to be supported on the ground of fraud in the second purchaser, the fraud must be very clearly proved." 2 Mass. R. 509. This remark applies as well to implied as to express notice. The principle is the same in both. The fact of notice must be proved by indubitable evidence; either by direct evidence of the fact, or by proving other facts, from which it may be clearly inferred. It is not in such case sufficient that the inference is probable, it must be necessary and unquestionable. The general rule in respect to implied notice is correctly laid down by Justice *Trowbridge*, though like all general rules, it admits, I apprehend, of some exceptions. "If," says he, "one seised in fee of land, for a valuable consideration, by deed bargains and sells the land to another in fee, the deed gives the bargainee a right to enter, and when he enters by force of that right, he then is possessed of the land, and complete tenant in fee; and such entry, being followed by *a visible improvement of the land, and taking the profits thereof*, is such an evidence of an alteration of the property, as will amount to implied notice thereof." 3 Mass. R. 575. Such a possession without the deed would amount to a disseisin, and nothing short of this can amount to implied notice. It is obvious that this is the opinion of Justice *Trowbridge*, and he certainly extends the doctrine of implied notice to its utmost legal limits.

He admits that the statute will have effect, "not only

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where the bargainee, without recording his deed, suffers the bargainor to remain in possession; but also where land lying waste is sold, and the purchaser neither records his deed, *nor enters and makes a visible improvement.* 3 Mass. R. 581.

But it is not always true that a possession, which if adverse would constitute a disseisin, would, under a deed not recorded, amount to implied notice. The cases depend on different 156
principles. By a maxim of the common law for the avoidance of maintenance and stirring up of suits, no right of entry or reëntry can be granted or assigned to a third person. And if a disseisee makes a grant of the land, it is immaterial whether the grantee has notice of the disseisin or not. But when a grantee or bargainee records his deed, and a prior deed, not registered, is set up to defeat his title, notice of such prior deed is not only material, but is indispensable to give it validity. The first deed is void by the statute, as to the subsequent purchaser, and the possession under it does not amount to a disseisin, because the possession is not adverse nor tortious. If therefore the subsequent purchaser is not affected by notice, he has priority by virtue of the registering of his deed, and the express provision of the statute.

I admit that generally the open and notorious possession of the first purchaser under his deed would be sufficient to raise a legal presumption of notice.[1] But suppose that a lessor should grant the fee of the land to the lessee, he being in possession under the lease, and the next day should make a second grant to a third person who well knew that the lessee the day before was in possession under the lease, how does his continued possession furnish evidence of notice of his purchase? To imply notice in such case, is to presume a fact, without proof, and against probability.

But the present case does not require us to consider this or any other exception to the general rule; for we are of opinion that nothing appears by the evidence which will warrant the application of the rule itself. There is no evidence to show that the tenant, at the time of the attachment, or at any time previous, had the open visible possession and im-

[1] *Colby* v. *Kenniston*, 4 N. Hamp. R. 262.

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provement of the premises. If there had been no deed from Timothy, the possession of the tenant would not have been such as to have constituted a disseisin. The repairing of the fence, setting aside the deed, would have been neither a disseisin nor a trespass. This was an ancient fence, and inclosed the lots as a general field, there being no partition fence between the allotments to Martin and Timothy; and as Timothy
157 improved no part of his allotment, which was principally woodland, he was not bound to repair the fence, nor had a right to prevent Martin from repairing it, so as thereby to leave his field exposed to cattle. *Vide St.* 1785, *c.* 53, concerning general and common fields, § 12.[1] Nor was the depasturing of the small strip of improved land included in Timothy's allotment either a disseisin or a trespass. The tenant had a right to turn his cattle into his own pasture; and if they strayed into Timothy's portion of the pasture, it was no trespass. As to cutting the trees and removing the old hovel, they were mere trespasses, supposing there had been no deed from Timothy. The deed from Timothy was not followed by any apparent change in the possession. If it had not been made, no doubt the visible possession and occupation would have remained the same. The old fence would not have been removed, and there would have been no partition fence, for it would have been useless. To Martin it would have been an expense without profit; and it could have been of very little profit to Timothy. The little strip of cleared land which fell to his share could not have been made to yield a profit equivalent to the expense of fencing it. The tenant's possession, therefore, considering the attending circumstances, is hardly sufficient to put a party upon inquiry, and is very slight ground for implied notice of a prior deed.

We are therefore of opinion that there is no legal presumption of notice arising from the facts in the case, and that the verdict cannot be sustained.

We have been led to this conclusion without considering the evidence on the part of the demandant. That evidence is very strong to negative the fact of notice. Whether if the

[1] Revised Stat. *c.* 43, § 29.

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possession had been such as to raise a legal presumption of notice, it might not be rebutted by other evidence, is a question upon which we give no opinion.[2]

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Verdict set aside and a new trial granted.

AARON HUMPHREY *versus* TIMOTHY WHITNEY. 158

Land given to a town for the use of "the ministry," may, with the leave of the legislature and the consent of all parties interested, be appropriated to the support of several ministers settled over distinct portions of the inhabitants of the town; the original purpose of the grant being preserved by such a disposition of the property.

Thus, in 1741, the legislature granted to individuals a township of land, part of it to be reserved for the use of the ministry. In 1764, the grantees settled their first minister, who was of the congregational order, and who entered on the ministerial land and occupied it until 1797. In that year the legislature, in pursuance of a vote of the inhabitants of the town, including christians not of the congregational order, passed a resolve, authorizing this land to be sold by the minister and selectmen, and the income of the proceeds to be applied annually for ever, in certain proportions, to the support of the ministers of the congregational society, and of a protestant episcopal society then existing, but not incorporated until 1823. The land was sold and the income applied accordingly until 1824, when the members of the congregational society organized themselves as the first parish, and forbade any part of the income to be paid to the minister of the episcopal society. *Held*, that the resolve was not unconstitutional, and that such minister was entitled to recover his stipulated proportion.

THIS case came before the Court upon an agreed statement of facts.

On the 13th of January, 1741, the legislature granted to seventy-six petitioners a township, to be laid out in seventy-

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[2] The following cases will show under what circumstances a second purchaser or an attaching creditor has been held to have had sufficient notice of a prior unrecorded deed, to defeat his purchase or attachment. *Cushing* v. *Hurd*, 4 Pick. 256; *Newhall* v. *Burt*, 7 Pick. 157; *M'Gregor* v. *Brown*, 5 Pick. 174; *Clark* v. *Jenkins*, 5 Pick. 280; *Shaw* v. *Poor*, 6 Pick. 86; *M'Fall* v. *Sherrard*, 1 Harper's (S. Carol.) R. 295; *Webster* v. *Maddox*, 6 Greenl. 256; *Stanley* v. *Perley*, 5 Greenl. 369; *Doe* v. *Allsop*, 5 Barn. & Ald. 142; *M'Neal* v. Cohill, 2 Bligh, 228; *Dudley* v. *Sumner*, 5 Mass. R. 438; *Marshall* v. *Fisk*, 6 Mass. R. 24; *Davis* v. *Blunt*, 6 Mass. R. 487; *Browne* v. *Maine Bank*, 11 Mass. R. 153; *M'Donald* v. *Leach*, Kirby, 72; *per Hosmer*, C. J., 4 Connect. R 577; *Lambert* v. *Nanny*, 2 Munf. 196; 2 Powell on Mortg. (Rand's ed.) 631

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nine shares, one of which was to be for the first settled minister, one for the ministry, and one for the school, on certain conditions which were afterwards performed. The proprietors laid out the township in shares accordingly, built a meeting-house, and in 1764 settled and ordained the Rev. Daniel Collins, who was of the congregational order, as their first minister. He entered upon the share appropriated for the ministry, and occupied it until the 18th of May, 1797, when it was sold in virtue of a resolve of the legislature of the 15th of February, 1797. The township was incorporated in 1765, by the name of Lanesborough.

At a town meeting in May 1796, a vote was passed, all denominations of christians that were present voting, that the town would petition the legislature that the ministry land might be sold, and the proceeds be kept as a fund for the benefit of the congregational society and the protestant episcopal society in the town, the congregational to have four-fifths and the episcopal one-fifth of the income
159 for the support of their several ministers and their successors for ever; and that G. Wheeler and W. Hubbell (both members of the congregational society) should be a committee to present the petition. This committee accordingly presented a petition to the legislature in May 1796, which was continued to the next session to be held in February, 1797.

At a town meeting held in September 1796, for the purpose of ascertaining whether the town would not reconsider the former vote, a committee was appointed, consisting of three congregationalists, three episcopalians, and three baptists, who at a town meeting held in November following, reported, that Mr. Collins should receive out of the income of the money arising from the sale of the ministry land, 66 dollars, 67 cents annually, during his ministry, in addition to his salary, as a compensation for relinquishing the land, and that the same sum should remain to his successors of the congregational order forever; and that of the remainder of the income Mr. Collins and his successors should have two-thirds, and the Rev. Daniel Burhans, minister of the protestant episcopal church, and his successors,

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should have the other third. A vote was passed in conformity to this report.

On the 15th of February, 1797, the legislature passed a resolve, authorizing Mr. Collins and the selectmen of the town for the time being, to sell the ministry land, and put the proceeds of the sale on interest, the income to be applied, under the direction of such persons as the inhabitants of the town might from time to time appoint for that purpose, in the manner contained in the vote last mentioned; with a proviso, that it should be in the power of the legislature, on the application of any denomination of christians having a settled minister in the town, thereafter to make a new appropriation of the income.

Pursuant to this resolve the land was sold in March 1797; and notes were taken payable to the selectmen and their successors, and the income of the fund was applied, agreeably to the resolve, up to January 1824. In November 1797, the treasurer of the town was appointed trustee of the fund, and the notes were delivered into his hands, to be renewed as they became due. After this period the notes 160
were taken, some in the name of the inhabitants of the town, and some in the name of the treasurer and his successors.

On the 8th of June, 1814, upon an application made, without any authority from the town, by Mr. Collins, Mr. Purdee, minister of the protestant episcopal church, and the selectmen, two of whom were congregationalists and one an episcopalian, the legislature, without issuing any order of notice to all persons interested, passed a resolve, repealing the proviso before mentioned and confirming the appropriation of the fund and income as already established.

In May 1818, Mr. Sheldon, a minister of the congregational order, was settled as a colleague pastor with Mr. Collins over the congregational church and society, and he has continued to be their minister ever since. Mr. Collins died in August 1822. In April 1820, the plaintiff was settled and duly licensed by the bishop as the protestant episcopal minister, and from that time to the present he has officiated as such. The protestant episcopal society was organized in

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1767, and on the 3d of February, 1823, was incorporated by the legislature.

The congregational and episcopal societies made use of the corporate capacity of the town, and of the town officers, to raise and collect money for the salary of their ministers and for repairing and painting their meetinghouses, before 1797, occasionally, and uniformly afterwards until 1819, when the episcopal society raised money for these purposes by themselves; but this society voted and acted upon all other parochial subjects, and raised money for all other parochial purposes, by their own votes and proceedings.

In 1796, when the two votes were passed for obtaining leave to sell the ministry land, a majority of the voters were of the congregational order. There was then no baptist society in the town, and but a few persons of that persuasion. These few were exempted from taxation for the support of public worship in the other religious societies.

In December, 1824, the inhabitants of the town belonging to the congregational society organized themselves as a
161 parish, pursuant to *St.* 1786, *c.* 10, and elected parish officers, *viz.* three assessors, a prudential committee, a clerk, a collector and a treasurer. The defendant, who was treasurer of the town and had in his possession the notes constituting the ministry fund, was chosen treasurer of the parish, and appointed trustee of the fund, and was directed to retain it in his hands for the use of the parish. In January 1825, the plaintiff demanded 90 dollars and 23 cents of the income, as granted to him by the resolve first mentioned, which the defendant refused to pay, and to recover which this suit was brought.

If the Court should be of opinion, that in any form of action the plaintiff was entitled to recover, the defendant was to be defaulted; otherwise the plaintiff was to become nonsuit.

Briggs for the plaintiff. An alienation of ministerial land by the parish with the consent of the minister, is valid. *St* 1785, *c.* 51, § 1; *Brown* v. *Porter*, 10 Mass. R. 99,

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Wesson v. *Hunt*, 2 Mass. R. 502; *Brown* v. *Nye*, 12 Mass. R. 288. The town in its parochial capacity and the minister have here joined in the sale. If it is objected that persons not congregationalists voted at the town meetings, the answer is, that most of the voters were congregationalists. No attempt was made by the town, nor by individuals, for twenty-six years, to resist these doings of the town and of the legislature, and this must be taken as conclusive evidence of an acquiescence in the arrangement. In addition to the concurrence of the town and congregational minister, we have the confirmation of their proceedings by the legislature; which would cure all previous defects of form. Though the land may have once belonged to the first society, yet the Court will not uphold them in violating this contract, which has been fairly entered into, and which is in furtherance of the intention of the original grantors of the land.

Besides, the original grant was for public purposes, and the town being a corporation for public purposes and under the control of the legislature, that body had a right, if not to take back the gift, at least to vary the mode of using it. *Dartmouth College* v. *Woodward*, 4 Wheat. 629, 659.

E. H. Mills for the defendant. The ministerial land was 162
not reserved for public purposes generally, but for the particular purpose designated, and the legislature had no power to alter that designation, any more than to control the tenure of land granted to an individual.

By the organization of an episcopal society in Lanesborough, in 1767, the remaining inhabitants of the town constituted the first parish, having all the parochial rights and property previously belonging to the town. *First Parish in Brunswick* v. *Dunning*, 7 Mass. R. 447; *Brown* v. *Porter*, 10 Mass. R. 93; *First Parish in Shapleigh* v. *Gilman*, 13 Mass. R. 190; *Baker* v. *Fales*, 16 Mass. R. 488; *Jewett* v. *Burroughs*, 15 Mass. R. 467; *Prov. St.* 16 *Geo.* 2, *c.* 1. After that event the votes of the town as a parish would be merely void. The meetings in 1796, were not parish meetings but town meetings, as is manifest from the appointment of committees consisting in part of episcopalians and baptists;

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and it does not appear that the voters of those sects did not control the congregational society. Nothing passed by the sale, and the land might now be recovered back; the parish however do not want the land, but they are entitled to the money paid for it. *Harrison* v. *Bridgeton*, 16 Mass. R. 16. Supposing it to be necessary that the episcopal society should be incorporated before the congregational society could become the first parish, then the legislature could not, in 1797, have given that society a part of the land; and no more could they a part of the money; neither can that society now claim part of the fund, for the owners of the land are entitled to the price. To the argument derived from the lapse of time the answer is, that the parish, until recently, have never done any act in relation to the fund, and even if some of the proceedings are to be considered as the acts of parish officers, they were a breach of duty and not binding on the parish; and further, neither the parish nor its officers had any power to appropriate this money to any other purpose than the support of religious worship in the first parish. Suppose that a ministerial fund had been created when the town was first settled, and that to the time of the incorporation of the episcopal society
163 a part of the income had been paid over for their use, yet at the moment of incorporation the claim of that society must cease. *Brown* v. *Porter*, 10 Mass. R. 92. The votes of 1796 were passed under a mistaken apprehension of the rights and duties of the town or parish and do not bind the parish; and the acts of the legislature which were intended to give them validity are of no effect. Ibid. 99. The episcopal society has not parted with any thing as a consideration for receiving a portion of the income of the fund.

H. Hubbard in reply. A town in its institution includes all the attributes of a parish, and there having been no legally incorporated society distinct from the town of Lanesborough at the time when the votes in question were passed, all persons qualified to vote on the municipal affairs of the town were entitled to vote on its parochial affairs. *Turner* v. *Second Precinct in Brookfield*, 7 Mass. R. 60. The inhabitants assembled in legal town meeting, and agreed that there should be a sale of the ministry land and a division

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of the income of the proceeds between the protestant ministers in the town. The agreement was made in concurrence with the minister of the town or first parish, and there should seem to be no valid objection to carrying it into effect. The fallacy on the part of the defendant consists in supposing that there is a change in the destination of the property; whereas in fact, whether it is applied to the support of two ministers or only one, it is equally appropriated to the use of the ministry. Moreover, the legislature have sanctioned this agreement, and it is laid down by Lord *Coke* and others, that the donor and donee may join and alter the disposition of the property. The proceedings in the present case were only making partition among tenants in common upon their joint petition.

The opinion of the Court was delivered at May term, 1826, as drawn up by

May term 1826.

PARKER C. J. [After stating the facts.] The defendant acting for the parish, which was organized in 1824, defends against the plaintiff's claim for his accustomed portion of the income, as established by the foregoing proceedings, by denying the validity of all those proceedings, and by asserting a right in the parish, as lawful successors to the original grantees of the land, or as a body for whose use it was granted as a ministerial lot, to the whole of the income arising therefrom, notwithstanding the agreement before stated, the legislative proceedings founded thereon, and the entire acquiescence of all the parties in any way interested in the fund for a period of nearly thirty years.

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The first position taken in support of this defence is, that the grant being made to the original proprietors or grantees of the township for specific purposes stated therein, it was not within the constitutional power of the legislature to vary the terms of the grant or the uses and purposes for which it was made. And the position is correct with the limitation, that with the consent of the parties legally and equitably interested in the grant, a legislative act will avail to enable those parties to carry into effect just and honest intentions in relation to the property, preserving the original purpose and object of the grant. The donor was the legislature itself, the donees

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or the *cestui que trusts* of the grant, were the proprietors and settlers in the township of Lanesborough, who afterwards became inhabitants of the town of Lanesborough, and the ministers of that town. An act relating to this property, founded on the consent of all these parties, and which does not change the use and application of the property, but distributes its income equally between two religious societies formed out of the inhabitants of the town, cannot we think be unconstitutional.

Had the original grant been appropriated to the support of a minister of the congregational order only, there might be more reason for complaint of these proceedings; but the grant is of one lot for the use of the first settled minister, and of the lot in question for the use of the *ministry only*; so that the first settled minister of any denomination whatever would have acquired a title to the first lot, and the other would have belonged as ministerial land to the minister of any denomination who should have been regularly settled by the people of that township. An appropriation of the fund to the support of regularly settled ministers over any portion of the people, who should have constituted themselves a religious society
165 distinct from the rest, with the consent of the principal body, under the sanction of the legislature, cannot be thought unjust or unwise, and is in no respect inconsistent with the original purposes of the grant.

It has not been unusual for the legislature to authorize towns, parishes, and other public bodies, to convert real into personal property for the benefit of such corporations; and there certainly can be no objection to the exercise of this power, if thereby the will of the donors is not changed or perverted. And in the case before us, as the grant in 1741 was for the support of *the ministry*, for the benefit of the inhabitants of Lanesborough, it is no misapplication of the bounty to cause it to aid in the support of two regularly settled ministers instead of one.

In order to fortify this position taken by the defendant, it is argued, that immediately upon the organization of the episcopal society in Lanesborough, which was in 1767, the rest of the inhabitants became a separate and distinct parish

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having the immunities and privileges of the first parish in that town, and that therefore the proceedings of the town, in 1796 and 1797, relative to the division of this property and the application for the sale of it, were void, because it was a subject of parochial interest, and the town as such had no control over it. But at that time the episcopal society existed only as a voluntary religious society. It was not incorporated, nor did it act in the assessment of taxes except through the municipal power. Neither did the congregational society assume a distinct legal character until within a few years; but all parochial concerns were conducted under the forms of municipal authority, according to the usages of our towns and parishes in early times. As a town it raised taxes for the support of its minister, and in the same capacity contracted with and settled a colleague pastor. Now admitting that by the mere organization of the episcopal church, without any act of incorporation, the residue of the inhabitants might have assumed the character of the first parish and organized themselves as such, yet they did not do it, but continued to transact all their parochial business under municipal authority until the episcopal church was in fact incorporated, which was not until 1823. Their doings in regard to the property in question were then as valid and effectual as any other transactions of a parochial nature which they undertook to perform. But a legal body politic is not created, or was not at that period, merely by a voluntary association of individuals; it may perhaps exist by prescription, but at the period of these transactions no such title could be affirmed, for the society had not pretended to claim or exercise the rights of a body politic. The town, then, when it voted to apply to the legislature for authority to sell the land and to appropriate its proceeds in the manner stated, were exercising parochial rights over parochial property in the accustomed manner, and for purposes beneficial to those who were interested in the property.

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The case of the *First Parish in Brunswick* v. *Dunning*, does not militate against this doctrine, for two poll parishes

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had been incorporated in that town, when the plaintiffs in the suit claimed to be considered as the first parish.

Then it is said the sale is void, because property thus appropriated cannot be parted with, even with the aid of legislative authority for that purpose; and the case of *The Inhabitants of Harrison* v. *The Inhabitants of Bridgeton* is cited to maintain this point. But that case does not deny the validity of a sale under such authority; it only decides that the property thus sold was not, by the true construction of the act, to be divided between *Harrison* and *Bridgeton*, from which last town Harrison was created. The right of the town with its minister, upon license from the legislature, to sell, is not denied; but it is held that no change in the use of the property could thus be made; and although it is stated that the town could not dispose of the property, the evident intention of the Court is, that it cannot be treated like other town property, but must be dealt with as parochial property, that is, that the minister and the town as a parish can alone transfer the fee.

It is true that the town or parish cannot dispose of land or other property thus held, otherwise than according to the provisions of the grant by which they hold; but we consider the
167 appropriation made in the grant conformed to in the subsequent disposition, because the grant was for the use of *the ministry* generally; if it had been limited to the use of the *congregational ministry*, this objection would apply.

After thus considering all the objections which have been raised to this apparently most just and equitable disposition of a public fund, we are unable to perceive any ground to justify the present congregational society in taking possession of the whole fund and refusing to share the income according to an amicable adjustment made in the year 1796, and which has acquired all the force of a contract under the resolve of the legislature.

The first parish are lawful successors to the town in all the property of a parochial nature which remained the town's when the parish came into existence, but before that time the town had agreed upon a division with part of the inhabitants, who

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had as good a right to the property, in proportion to their number, as any other part, and this bargain has been sealed and sanctioned by the legislature. Humphrey v. Whitney.

The defendants must be defaulted and judgment be rendered for the sum agreed on.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF HAMPSHIRE, FRANKLIN AND HAMPDEN, SEPTEMBER TERM 1825, AT NORTHAMPTON.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, }
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON, }

RICHARD E. NEWCOMB, Judge &c., *versus* ISAIAH WING *et al.*

In stating as a breach of an administration bond, that the administrator did not inventory land which the intestate, in his lifetime, to defraud his creditors, conveyed to the administrator, *it seems* it should be averred that the administrator was a party to the fraud or had knowledge of it.

A suit in the name of the judge of probate upon the bond of an administrator of an insolvent estate, for not inventorying real estate fraudulently conveyed by the intestate, cannot be sustained for the benefit of an individual creditor; but if the administrator, upon notice, does not get license to sell such estate, or otherwise account for it, the judge may sue the bond for the benefit of all the creditors.

THIS was an action of debt upon an administration bond, brought in the name of the judge of probate for the county of Franklin for the benefit of Epaphroditus Champion.

The defendants pleaded a general performance of the condition. The plaintiff replied, that B. Leonard the intestate, on the 27th of October, 1820, was seised in fee simple of

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certain parcels of land in Conway; that on the 28th he fraudulently conveyed them to Wing (the administrator) with intent to defraud and deceive his creditors of their just debts; that this real estate was at the time of Leonard's death liable for the payment of his debts, and when administration was granted to Wing, on the 15th of July, 1823, the same real estate came to the knowledge and into the hands and possession of Wing as the estate of Leonard, and was liable by law to be inventoried as Leonard's estate, and in case the personal estate were insufficient for the payment of his debts, to be administered by Wing for the payment of such debts; that the personal estate was insufficient; that Wing represented Leonard's estate to be insolvent; that commissioners were appointed; that Champion's debt was due on the 1st of October, 1820, and was proved under the commission and allowed; that the doings of the commissioners were returned into the probate court, ratified and approved; that the estate of Leonard, exclusive of the real estate mentioned, was in fact insolvent; yet that Wing, well knowing the premises, did not inventory the same real estate. To this the defendant demurred, and assigned causes of demurrer.

Sept. 27th

E. H. Mills and *Wells*, in support of the demurrer, cited *St.* 1786, *c.* 55, § 1; *Wildridge* v. *Patterson*, 15 Mass. R. 148; *Johnson* v. *Libby*, ibid. 140; *Freeman* v. *Anderson*, 11 Mass. R. 190.

Billings, for the plaintiff, cited *St.* 1805, *c.* 90, § 5; *Drinkwater* v. *Drinkwater*, 4 Mass. R. 357; *Mansfield* v. *Patterson*, 15 Mass. R. 491.

Sept. 28th

PARKER C. J. delivered the opinion of the Court. It is made a question, whether upon the facts set forth in the replication, admitting them to be rightly pleaded, the plaintiff is entitled to his action. The substance of the replication is, that certain real estate of the intestate had been fraudulently conveyed by him in his lifetime, and that being liable by law to his debts, it ought to have been inventoried; and the breach of the bond alleged in the replication, is the not inventorying this real estate. It is doubtful, at least, whether the replication is sufficiently particular. It does not directly charge the defendant with being a party to the fraud, nor with knowledge

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in any other way, though it is strongly implied in the replication.[1]

We do not however determine upon the sufficiency of the replication in this point of view; but upon other and more general grounds, we think no right to this action is shown. To maintain a suit on a probate bond, in order to obtain execution by any particular person interested in the estate, he must be a creditor with his debt ascertained, or an heir with his decree of distribution, and in either of these cases there must be a demand on the administrator before the suit is commenced.[2] It is not shown in the replication what sum is due to the person for whose use the suit is brought, nor that he made any demand. It appears by the indorsement on the writ, that the suit is brought under the special provisions of the statute, so as to enable the real plaintiff to have execution for the amount recovered, and if this suit should prevail, he might take the whole of the property for his debt, although there are many other creditors equally interested in the fund with himself. There is no case in which this will be allowed, except when a creditor, who has neglected to file his claim, has *discovered* estate which has not been inventoried, and then the action cannot be upon the bond, but it is against the administrator for the debt, and the property discovered may be seized on execution.

In the case supposed by this replication, if the administrator, upon notice, does not obtain license to sell the estate, or otherwise account for it, the judge of probate, at the instance of the creditors, will sue the bond, not for any particular creditor, but for the whole, and the proceeds of the suit will be distributed among all. Or perhaps any creditor, who

[1] See *The People* v. *M'Donald*, 1 Cowen, 189. The administrator is bound to inventory land which to his knowledge has been fraudulently conveyed by the intestate. *Minor* v. *Mead*, 3 Connect. R. 289.

But if the administrator has no knowledge that the conveyance was fraudulent, he cannot be made liable for not inventorying the property. *Booth* v. *Patrick*, 8 Connect. R. 106. See *Potter* v. *Titcomb*, 1 Fairfield, 53; *Cringan* v. *Nicholson*, 1 Hen. & Munf. 428.

[2] See *Paine* v. *Moffit*, 11 Pick. 500; *Coffin* v. *Jones*, 5 Pick. 61; *Dawes* v. *Head*, *ante*, 128; *Dawes* v. *Swett*, 14 Mass. R. 105; *Paine* v. *Gill*, 13 Mass. R. 365; *Prescott* v. *Parker*, 14 Mass. R. 429; *Judge of Probate* v. *Briggs*, 5 N. Hamp R. 66

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has not filed his claim, may sue the administrator and levy upon the land; in which case he may be answerable on his bond for waste or unfaithful administration; and thus all the creditors will obtain their portion of the funds. No creditor can sue the bond, except according to the provisions of the statute, without license or permission of the judge of probate. *Robbins, Judge &c.*, v. *Hayward*, 16 Mass. R. 524.

Replication adjudged bad.

WILLIAM KNIGHTS *versus* WILLIAM PUTNAM and SAMUEL PUTNAM.

Where a contract is attempted to be avoided or enforced by the oath of a party, pursuant to *St.* 1783, *c.* 55, § 2, against usury, all the debtors or all the creditors must offer to swear, and if required, actually swear, respectively, that there was or was not usury.

ASSUMPSIT upon a joint and several note given by the defendants to the plaintiff. At the trial the counsel for the defendants offered to prove, by the oath of William Putnam, under *St.* 1783, c. 55, § 2, that the note was given for a usurious consideration. The plaintiff objected that he was not obliged by law to repel this defence by his oath, unless both defendants should offer to swear, and if required, should actually swear to the alleged usury. It was admitted that Samuel Putnam was living and was a resident in the county of Franklin, where the action was tried. The judge ruled in favor of the plaintiff; whereupon the defendants suffered a default, subject to the opinion of the whole Court.

A Brooks now moved that the default should be taken off. The statute provides, that "if the debtor or debtors" shall offer to make oath, &c., that usury has been reserved or taken, the contract shall be void, unless the "creditor or creditors" will swear to the contrary. Under this provision it will be sufficient, in a case where there are several debtors, for one to make oath to the usury. There can be no well founded objection against such construction upon principles of expediency or public policy; because, if the testimony of the

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Knights v. Putnam.

debtor is untrue, it may always be defeated by the testimony of the plaintiff. On the other hand, if all the debtors are required to swear to the same fact, the positive testimony of any number of witnesses rendered competent by the statute, may be overthrown by the opposing testimony of a single witness who is a creditor. So if there be but a single debtor, the statute must be held to require all the creditors, how numerous soever, to contradict his testimony, in order that they may recover. It happens not unfrequently that some of the

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debtors are ignorant of the fact of usury, especially where they are sureties merely; and can it be supposed that the oath of the principal is not to be received, because the sureties cannot join in the oath? Again, if the plaintiff's construction is adopted, however numerous the debtors or creditors may be, it will always be in the power of a single one of them to deprive the rest of their lawful rights, by refusing to join in the oath. In the case of creditors such a rule might operate with great severity and injustice; for where the debtor chooses to resort to this mode of proving usury, the creditor has no means of disproving the fact but by his own oath.*[1]

Wells for the plaintiff.

Sept. 28th.

PARKER C. J. delivered the opinion of the Court. We think that according to the words of the statute, and probably the intent of the legislature, the parties to the suit, whether consisting of one or more, are required to swear to the fact of usury. If there are two or more defendants, we see no reason to suppose that the legislature intended that if one would swear to the fact and the others should refuse, the debt should be avoided. It ought to be made difficult for men to avoid their own contracts by their own declarations. If the statute itself creates inconvenience, it must be imputed to the nature of the subject and the difficulty of adopting novel principles in the administration of justice.

Without doubt the same rule of construction must be applied to the other branch of the requisition. Where there are more

* But see St. 1825, *c.* 143, § 2, and St. 1826, *c.* 27, § 5. [Revised Stat. c. 35, § 4.]

[1] See *Frye* v. *Barker*, 2 Pick. (2nd ed.) 65, n. 1; *Train* v. *Collins*, 2 Pick (2nd ed.) 152, n 1.

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creditors than one, they must all tender their oath to defeat the oath of the debtor. This also may be very inconvenient, but there is scarcely any application of this part of the statute which will not present inconveniences. So that the argument *ab inconvenienti* will hardly be a safe guide on this subject. Whenever there shall be great practical inconvenience, the legislature will give relief; until then we must enforce the statute as we find it.

Knights v. Putnam.

Motion overruled.

The Inhabitants of BUCKLAND *versus* The Inhabitants of CHARLEMONT. 173

Exceptions to the instructions of the Court of Common Pleas to the jury may be alleged for the first time, after the verdict is returned.[1] *Semble.*

One who becomes *non compos mentis* after having come of age, does not follow the settlement of his father.

Incipient insanity does not incapacitate one for gaining a settlement.

THIS was an action of *assumpsit*, brought originally before a justice of the peace, to recover expenses incurred in the support of Miriam Pierce, a pauper, whose settlement was alleged oy the plaintiffs to be in Charlemont.

At the trial before the Court of Common Pleas, it was admitted, that Josiah Pierce, the pauper's father, had his settlement in Charlemont on the 16th of May, 1813, at which time the pauper became twenty-one years of age; that she had always resided with and constituted a part of her father's family; that the father removed to Buckland more than six years ago, where he had since gained a settlement. The defendants contended, that the pauper, at the time when she became of age, was in a state of mental derangement and had so continued ever since, and that her settlement must therefore follow the settlement of her father.

It was admitted that the pauper was in a deranged state of

[1] Under the Revised Statutes, exceptions to the instructions of the Court of Common Pleas, must be presented to the court before the adjournment thereof without day. Revised Stat. *c.* 82, § 12.

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mind in September 1813, and the question was, whether she was so at the time when she came of age. There was much evidence on both sides in relation to her conduct and appearance at that time.

The counsel for the defendants contended that this was not a case of lunacy, but of general mania, which had increased steadily, and without intermission, into a state of furious madness, and that the pauper was a proper subject of guardianship from the time when the first decisive symptoms of her malady appeared; and that the same circumstances and appearances attending her before she became of age, as had attended her since she had been in a state of acknowledged mental derangement, was evidence that she was at that period subject to the same malady.

174 But *Howe* J. instructed the jury, that they should first inquire whether some singularities of conduct testified of, were natural to her, or were the commencement of her derangement; that it was proper for them to take into consideration her subsequent madness, so far as it tended to throw any light upon this previous conduct: but that if it was doubtful whether these acts were the inception of disease or mere peculiarities of natural character, their verdict must be for the plaintiffs. He also instructed them, that if they were satisfied that these singularities were the commencement of the pauper's insanity, they would then inquire how far her mind had become affected by it at the time of her coming of age; that there must have been such an alienation of intellect as would make it the duty of the judge of probate, upon a representation of the facts, to appoint her a guardian; that to justify this, her mind must have so far lost its balance as to render her incapable of making a valid contract; that her alienation of intellect must have been such as would justify commissioners of lunacy in England in finding her insane from May 16th, 1813.

The jury found a verdict for the plaintiffs. After the verdict was returned, the counsel for the defendants excepted to the foregoing instructions, and the judge allowed the exceptions; although it was contended on the other side, that the defendants had lost their right to except, by acquiescing in the instructions until the verdict was returned.

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E H. Mills, now insisted that the exceptions came too late. The statute of 1820, c. 79, § 5, says, that it shall be lawful for a party thinking himself aggrieved by any direction of the Court of Common Pleas, in any matter of law, "to allege exceptions to the same, which exceptions being reduced to writing, in a summary mode, and being presented to the court, before the adjournment thereof, &c., shall be allowed." This means, that the exceptions shall be *alleged* at the trial or before the verdict, and be *reduced to writing* before the adjournment of the court. [*Wilde* J. The constant practice has been otherwise. How do you limit the time for alleging the exceptions?] The statute did not intend to allow a party to wait till the verdict should be returned. [*Parker* C. J. It 175
would be inconvenient if a party must constantly interrupt the judge, or if the jury must be called back.] That has been done. [*Parker* C. J. But if done frequently it would occasion much embarrassment.] It has been decided that after a witness has testified, it is too late to object to his testimony. The exceptions should be taken orally before the verdict, in order that the judge may have an opportunity to explain himself, and that there may be a fair trial. Otherwise, a party will take his chance for a verdict, and when it is found against him, he will look about to see whether he may not obtain a new trial, because the judge has stated some wrong general principle or has omitted to charge in matter of law. The rule we contend for is the rule of the common law and accords with decisions in other States. *Jones* v. *Ins. Co. of N. America*, 4 Dall. 249; *S. C.* 1 Binn. 38; *Lanuse* v. *Barker*, 10 Johns. R. 312.[1] [*Wilde* J. The common law is different from our statute, and for twenty years it has been the practice to allege exceptions after the verdict, and sometimes it has been done on the last day of the term. Where a judge has omitted to charge on any particular point, it has been decided that he should have been requested to charge on such point;[2] but I never heard the present objection raised. *Putnam* J. If the

[1] See also *Clemson* v. *Kruper*, 1 Breese, 102; *Johnson* v. *Ackless*, 1 Breese, 60.

[2] It is the duty of the judge, whenever requested, to charge the jury on every point pertinent to the issue. *Lapish* v. *Wells*, 6 Greenl R. 175.

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point is raised in the argument at the trial, I think it is sufficient. If it is not suggested then, I think it is too late, after the verdict, to suggest it for the first time.]

Allen, *contrà*, cited *Church* v. *Hubbart*, 2 Cranch, 239, note.

The *Chief Justice* intimated, that in his opinion the exceptions were taken in season, and the objection was not further insisted on.[3]

Allen and *Maxwell*, in support of the exceptions. We have no scale to measure the degrees of insanity. As soon as the principles of association in the human mind are observed to be deranged, we can make no calculation upon its operations. The subsequent madness of the pauper showed decisively that the singularities in her conduct before she became of age were the commencement of her malady; just as in the smallpox the
176 breaking out fixes the character of the symptoms. If these positions are correct, the pauper was incapable of making a contract, and a proper subject of guardianship, from the time that she showed symptoms of mental derangement; and the rules laid down by the judge in relation to a commission of lunacy and the power to make a valid contract, tended to mislead the jury.

Wells, for the plaintiffs, insisted that the instructions to the jury were correct; and he distinguished this case from *Upton* v. *Northbridge*, 15 Mass. R. 237, where the settlement of an idiot *a nativitate* was held to follow that of his father, inasmuch as in the present instance there was a time when the pauper had a capacity to acquire a settlement for herself.

Sept. 30th. PARKER C. J. delivered the opinion of the Court, to the following effect. The question is, whether the pauper, by virtue of her father's removal, gained a settlement in Buckland. This depends upon the question, whether she was of sound mind when she became of age. If she was, her settlement did not follow that of her father.[1]

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[3] See Howe's Pract. 455, 458; *Train* v. *Collins*, 2 Pick. (2nd ed.) 154, n. 1. It is said in *Ex parte Bradstreet*, 4 Peters's Sup. Ct. R. 102, that a bill of exceptions should be tendered at the trial.

[1] But an idiot or person *non compos*, is capable of gaining a settlement by any one of the modes pointed out not requiring any act of volition of his own

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It was contended, that if the singularities of conduct in the pauper were incipient madness, they were complete madness, which incapacitated her from making a contract; and her case has been likened to the smallpox, where the subsequent breaking out proves the symptoms to have been that disease. Perhaps this is not illogical; but the question seems rather to be, whether different degrees of the same disease are attended with the same consequences. Thus suppose it were made a question, whether a disease of which a person had symptoms, were contagious, and the person in a fortnight should break out; it might be clear that the symptoms were the smallpox, but not that the disease was at that time contagious. So here, incipient madness could not incapacitate the pauper from transacting business, and we think the reasoning of the judge very fair; otherwise it should seem to follow, that all the acts of a person who has symptoms of alienation of mind, and after a course of years becomes insane, may be avoided. The fact to be ascertained was, not whether there was absolute madness, but whether there was such a degree of mental derangement as to 177
incapacitate the pauper for gaining a settlement for herself. It is true we cannot measure the degree exactly, but we can come near enough for practical purposes; as in cases of insanity of testators. We do not think the allusion to a commission of lunacy material; it was used as an illustration merely, and was so understood by the jury.[1]

Judgment affirmed.

Lubec v. *Eastport*, 3 Greenl. 220. See also *Wiscassett* v. *Waldoborough*, 3 Greenl. 388; *Upton* v. *Northbridge*, 15 Mass. R. 239; *Watson* v. *Cambridge*, 15 Mass. R. 286; *Holyoke* v. *Haskins*, 5 Pick 20; *Cutts* v. *Haskins*, 9 Mass. R. 543.

See 14 Amer. Jurist, 253 *et seq.*

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SAMUEL WHITMAN *versus* GEORGE LEONARD.

The principle, that after a partnership is dissolved, one partner, dealing with a person who has no notice of the dissolution, may bind his copartner, applies only to transactions in the usual course of business.

Thus, where a partner having absconded, his copartner told the holder of a note against them not then due, that they were going to fail, and renewed the note in the name of the firm, making it payable on demand in order that the creditor might secure himself, it was *held*, that this note did not bind the absconding partner, notice of the dissolution being either not necessary or being implied by the transaction itself.

ENTRY sur disseisin. Trial upon the general issue.

Each party claimed the land by virtue of an attachment in his favor against Boyce & Luther and a subsequent extent. The demandant's attachment was on the 4th of January, 1823; the tenant's on the 9th of December preceding.

The demandant contended, that the tenant had no cause of action against Boyce & Luther when his attachment was made. The tenant produced a note, upon which his action was brought, dated the 23d of February, 1822, subscribed "Boyce & Luther," payable to the tenant, for 1000 dollars on demand with interest. One Day testified, that the tenant told him, when he made the attachment, that Luther came to him that morning and said, "that they were going to the devil," and that Luther renewed a note, which was not payable until August or September following, by making the note first mentioned. It was proved that Boyce had absconded three days
178 before Luther made this note, and had never returned to this commonwealth, and that the firm of Boyce & Luther had never transacted any business since Boyce absconded.

A verdict was taken for the demandant, subject to the opinion of the whole Court.

Sept. 29th. *Rice* for the tenant. A debtor has a right to favor a particular creditor and to give a note on demand for one which is on a credit not expired. *Hatch* v. *Smith*, 5 Mass. R. 49; *Stevens* v. *Bell*, 6 Mass. R. 343; *Cushing* v. *Gore et al.* 15 Mass. R. 74; *Hastings* v. *Baldwin*, 17 Mass. R. 556. If the partnership had not been dissolved by the absconding of one partner, the other would have had a right to give the note in question; and as the tenant had no notice that Boyce had

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absconded, but only that the firm was in failing circumstances, he may avail himself of this note. Watson on Partn. (2nd ed.) 384; *Lansing* v. *Gaine*, 2 Johns. R. 300; *Ketcham* v. *Clark*, 6 Johns. R. 144; *Godfrey* v. *Turnbull*, 1 Esp. R. 371; 1 Com. Contr. 325; *Parkin* v. *Carruthers*, 3 Esp. R. 248; Chitty on Bills (Philad. ed. 1821), 51, 52, and notes; *Barber* v. *Minturn*, 1 Day, 136.

J. H. Ashmun for the demandant. It will be presumed that the connexion in business between Boyce & Luther was a common general partnership; in which case either partner might put an end to it at any moment; and the demandant contends that the absconding of Boyce, as it was an act inconsistent with the general duties of the partnership, was itself a dissolution. Watson on Partn. 379, 380; Domat, *lib* 1, *tit.* 8, § 5; *Griswold* v. *Waddington*, 15 Johns. R. 83; *Ketcham* v. *Clark*, 6 Johns. R. 147.

The tenant however seems to rely on the fact, that he had no notice of the dissolution. Such notice is required, to guard against impositions in the regular course of business of the firm; to protect a person who is giving credit to the firm. *Gorham* v. *Thomson*, Peake's R. 42. This case does not come within the reason of the rule. Here there is no credit given; no trust reposed; no goods sold; the creditor knows the situation of the parties. This case is to be settled on general principles. None like it, as it regards notice, has been found. Those cases in which notice has been held necessary, were all founded upon 179
transactions in the regular course of business. There are two classes of cases which furnish the principle we contend for. The first, of conveyances made by a bankrupt in contemplation of an act of bankruptcy, which are void, unless made in the ordinary course of business without notice; *Ogden* v. *Jackson*, 1 Johns. R. 370; *Rust* v. *Cooper*, Cowp. 629; *Harman* v. *Fishar*, ibid. 117;—the second, of bills of exchange transferred in the ordinary course of business by persons who came unfairly by them, where the title of the innocent indorsee is valid against the former owner. *Miller* v. *Race*, 1 Burr. 452; *Grant* v. *Vaughan*, 3 Burr. 1516; *De Silva* v. *Fuller*, 1 Esp Dig. (Gould's ed.) 106. He cited also *Hack-*

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ley v. *Patrick*, 3 Johns. R. 536, and *Walden* v. *Sherburne*, 15 Johns. R. 409.

Lathrop and *E. H. Mills* on the same side.

Oct. 1st. PARKER C. J., in giving the opinion of the Court, said that no doubt a debtor had a right to favor a particular creditor, but the cases to that effect went upon the ground of fair dealing.[1] The case before us is this. There being a promissory note signed by Boyce & Luther not due, Luther goes to the promisee and tells him that they are in difficulty, and renews the note, making it on demand, in the names of Boyce & Luther. Had it been made in the name of Luther alone it might have been good. But here was an absconding of one partner which dissolved the partnership. It is said, however, that as to a person accustomed to deal with the partnership, it continued until he had notice of the dissolution. But that must apply to their usual dealings. Here, after an absconding of one partner, the other makes a note to charge the partnership, in order to give a creditor an opportunity of favoring himself; which was not according to the ordinary course of trade. Either no notice was necessary in such a case, or it is to be implied from the transaction.[2]

Judgment according to verdict.

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[1] 2 Kent's Comm. (2nd ed.) 532; Angell on Assignments, 23 *et seq.*

[2] See *United States Bank* v. *Binney*, 5 Mason, 183; *Chazournes* v. *Edwards*, *ante*, 9, n. 1, and 12, n. 1; *Vallett* v. *Parker*, 6 Wendell, 615; *Dob* v. *Halsey*, 16 Johns. R. 34; *Foot* v *Sabin*, 19 Johns. R. 154; *Smith* v. *Lusher*, 5 Cowen 688.

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EAGLE BANK at New Haven *versus* ABEL CHAPIN.

The contents of a written notice to an indorser of a promissory note may be proved by parol, without giving notice to produce such writing.

A notary makes a demand on the maker of a promissory note at New York on Friday, and on the same day gives to his clerk a notice to the indorser directed to the holder at New-Haven, to be put into the post-office. On Monday morning the holder sends it to Hartford by a messenger, with orders to inquire where the indorser lives, and there the messenger puts it into the post-office directed to the indorser at Springfield. The mail closes every day at 7 A. M. at New York and reaches New Haven in the evening and Springfield at 11 A. M. on Monday and 4 P. M. on Tuesday; and a letter put into the post-office at Hartford on Monday evening reaches Springfield at 4 P. M. on Tuesday. *Held*, that as the notice arrived at New Haven it was not necessary to prove that it was put into the post-office at New York; that whether it reached New Haven on Saturday or on Sunday was immaterial, as Sunday was not to be counted; that neither the notary nor the holder was bound to know where the indorser resided, and that both had used due diligence to give him notice.

THIS was *assumpsit* against the defendant as indorser of a promissory note, payable on the 1st of November, 1822, at the Merchants bank in the city of New York. A trial was had upon the general issue.

The plaintiffs produced the deposition of W. S. Rossiter, the cashier of the Eagle bank, stating that on the 1st of November the plaintiffs owned the note. Also the deposition of W. C. Mulligan, a notary public at New York, stating that on the 1st of November, which was Friday, he presented the note at the Merchants bank for payment, which was refused; that on the same day a notice was made out and examined by the deponent, directed to Chapin, and enclosed in a letter directed to Rossiter, at New Haven, and delivered to the deponent's clerk to be put into the post-office in New York; that the deponent did not know the place of residence of Chapin, and therefore he sent the notice to Rossiter, at whose request the demand of payment had been made.

They produced also the deposition of J. S. Barnard, a clerk in the Eagle bank, stating that on Monday, the 4th of November, he received from the president of the bank a notice of the non-payment signed by Mulligan, with directions to go to Hartford with it and ascertain Chapin's place of residence, 181
and to put the notice into the post-office at Hartford; which

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he did a little before 9 o'clock on the evening of the same day, the mail being then not closed, to be forwarded to Springfield where Chapin resided.

It was proved that the mail from New York to New Haven and Springfield closes every day at 7 A. M. and leaves at 8, reaches New Haven the same evening, and Springfield, on Monday, Wednesday and Friday, at 11 the next morning, on Tuesday, Thursday and Saturday, at 3 or 4 P. M.; that a letter put into the mail at New Haven at any time on Sunday or Sunday evening reaches Springfield on Monday at 11 A. M.; and that a letter put into the post-office at Hartford on Monday evening before the mail closes reaches Springfield on Tuesday at 3 or 4 P. M.

A verdict was directed for the plaintiffs, subject to the opinion of the Court.

Sept. 29th.

E. H. Mills and *G. Bliss* junior now contended, that the defendant was not liable upon the note, because the plaintiffs had not proved due diligence to give him notice of its dishonor.

1. Mulligan, the agent of the plaintiffs, was bound to know the place of residence of the defendant, who was their immediate indorser, and he ought to have directed the notice to him at Springfield; at any rate, whether it was sent to him or to the plaintiffs, it should have been put into the mail at New York on Saturday, the day after the protest. *Lawson* v. *Sherwood*, 1 Stark. R. 314; *Lenox* v. *Roberts*, 2 Wheat. 377, *Whitwell* v. *Johnson*, 17 Mass. R. 449; *Darbishire* v. *Parker*, 6 East, 3. As it was not received by Rossiter until Monday, it may not have been put into the mail until Sunday; the testimony of Mulligan's clerk should therefore have been produced. At least the question whether it was sent on Saturday or Sunday, should have been submitted to the jury. *Bateman* v. *Joseph*, 2 Campb. 461; *Hetherington* v. *Kemp*, 4 Campb. 193.

2. But if the notice was put into the post-office at New York on Saturday morning, by the course of the mail it must have reached New Haven in the evening, and the plaintiffs were

182 bound to know the defendant's place of residence, and they were guilty of laches in not sending the notice on Sunday

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morning, or at furthest Sunday evening, so that the defendant might receive it on Monday morning. In Connecticut, Sunday evening is not kept holy, so that this case differs from *Linde* v. *Unsworth*, 2 Campb. 602, where a Jew was excused from giving notice on the day of a great festival, on which all Jews were prohibited from attending to any secular affairs. There is no proof that the plaintiffs did not know where the defendant resided, and the presumption is the other way, as they received the note from him. But if they were ignorant, they should have made inquiry sooner than they did; and whether they were negligent in this respect was a question for the jury to decide. *Halliday* v. *Martinet*, 20 Johns. R. 175; *Bateman* v. *Joseph*, 2 Campb. 461; *Fisher* v *Evans*, 5 Binn. 541; *Browning* v. *Kinnear*, 1 Gow, 81.

3. The defendant had no notice to produce the letter written to him by Mulligan, and parol evidence of its contents was inadmissible. The cases cited in 2 Phil. on Ev. (6th ed.) 21, to the contrary, do not support him. We say that notice to produce such notice is necessary, unless a duplicate notice is produced by the witness. *Philipson* v. *Chase*, 2 Campb. 110; *Langdon* v. *Hulls*, 5 Esp. R. 156; *Bruce* v. *Hurly*, 1 Stark. R. 24; *Kine* v. *Beaumont*, 3 Brod. Bing. 288.

G. Bliss senior and *Morris*, for the plaintiffs, cited to the two first points, *Bateman* v. *Joseph*, 2 Campb. 461; *S. C.* 12 East, 433; *Browning* v. *Kinnear*, 1 Gow, 81; *Sturges* v. *Derrick*, 1 Wightw. 76; *Baldwin* v. *Richardson*, 1 Barn. & Cressw. 245; *Hartford Bank* v. *Stedman*, 3 Connect. R. 489; *Colt* v. *Noble*, 5 Mass. R. 167; *Haynes* v. *Birks*, 3 Bos. & Pul. 599; *Bank of Utica* v. *Smith*, 18 Johns. R. 230; *Bancroft* v. *Hall*, 1 Holt's N. P. R. 476; *Freeman* v. *Boynton*, 7 Mass. R. 483;—and to the third point, Phil. Evid. (6th ed.) 21; *Ackland* v. *Pearce*, 2 Campb. 601; *Johnson* v. *Haight*, 13 Johns. R. 470; *Lindenberger* v. *Beale*, 6 Wheat. 106; *Tower* v. *Wilson*, 3 Caines's R. 174.

PARKER C. J. gave the opinion of the Court to the following effect. It is objected, that the contents of the notice to the defendant should not have been proved by parol, he not having been called upon to produce the notice. But

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we do not think that rule of evidence is to be applied to such a case. A notice to an indorser relates to a few simple facts, and it has been usual to prove it without calling on the party to produce the written notice received by him; and this course is in accordance with some of the authorities cited.[1]

It is then said that the notary did not make due inquiry as to the defendant's place of residence. It was not necessary that he should know where the indorser lived. Often the indorsee does not know the fact, and in such case he shall not be obliged to act in the same manner as if he did.[2] The best thing the notary could do was to send the notice to New Haven. But it is objected, that he did not put it into the post-office in season. He was not bound to send it on Friday, for it has been decided that a man is not to neglect all other business for the purpose of giving notice to an indorser, but he shall have to the next day or the next convenient mail.[3] There is indeed no direct testimony that the notice

[1] *Kine* v. *Beaumont*, 7 Moore, 112; *Roberts* v. *Bradshaw*, 1 Stark. R. 28. As to the facts, which should be stated in the notice of dishonor, see *Solarte* v. *Palmer*, 3 Moore & Payne, 475; *S. C.* 7 Bingh. 530; 1 Tyr. Exch. R. 371; *Solarte* v. *Palmer*, 1 Crompt. & Jerv. 417; *Hartley* v. *Case*, 6 Dowl. & Ryl. 505; *S. C.* 4 Barn. & Cressw. 339; *Beauchamp* v. *Nash*, Dowl. & Ryl. N P. C. 3, per *Abbott* C. J.

Notice of non-payment need not be in writing; *verbal* notice is sufficient. *Cuyler* v. *Stevens*, 4 Wendell, 566.

[2] See *Church* v. *Barlow*, 9 Pick. 549; *Williams* v. *Germaine*, 7 Barn. & Cressw. 468; *S. C.* 1 Man. & Ryl. 394.

[3] Reasonable diligence and attention is all that the law exacts, and it is settled that each party into whose hands a dishonored bill may pass, shall be allowed one entire day for the purpose of giving notice. *Hawkes* v. *Salter*, 4 Bingh. 715; *Firth* v. *Thrush*, 8 Barn. & Cressw. 387; *Martin* v. *Ingersoll*, 8 Pick. 8; *Talbot* v. *Clark*, 8 Pick. 51; *Haynes* v. *Birks*, 3 Bos. & Pul. 599; *Tunno* v. *Lague*, 2 Johns. Cas. 1; *Hartford Bank* v. *Stedman*, 3 Connect. R. 489; *Parker* C. J. in *Barker* v. *Parker*, 6 Pick. 80; *Bank of United States* v. *Carneal*, 2 Peters's Sup. Ct. R. 543; *Bank of Alexandria* v. *Swann*, 9 Peters's Sup. Ct. R. 33.

In North Carolina the rule respecting notice is made to vary with the pursuits of the parties, and the same strictness is not required between two farmers in the country as between merchants in town. *Brown* v. *Johnson*, 1 Devereux, 293; *London* v. *Howard*, 2 Hayw. 332; *Austin* v. *Rodman*, 1 Hawks, 175. See also upon this point, *Shed* v. *Brett*, 1 Pick. 405; *Crenshaw* v. *M'Keiman*, 1 Minor, 173; *Greely* v. *Thurston*, 4 Greenl. 479; *City Bank* v *Cutter*, *post*, 414; *Boston Bank* v. *Hodges*, 9 Pick. 420; *Bussard* v.

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was put into the mail at New York, but this is immaterial, as it is proved to have arrived at New Haven as early as Monday morning. We discover no negligence on the part of the notary.

The defendant next objects, that it does not appear at what time the notice reached New Haven. But we are satisfied, that if the plaintiffs received it on Saturday, they were not bound to put it into the post-office again or send it by special messenger on Sunday. Neither the law nor the convenience of trade, in such a case, would require people to violate their conscientious scruples. Sunday is not to be counted. This renders it immaterial whether the notice arrived at New Haven on Saturday or Sunday. On Monday the plaintiffs sent a man to Hartford, with directions to ascertain the defendant's place of residence. It results from the nature of the transaction, that the plaintiffs did not know where he lived From Hartford the notice was sent by mail as soon as it could be. We think that the plaintiffs have used due diligence, and judgment must be according to the verdict.[4]

Levering, 6 Wheat. R. 102; *Lindenberger* v. *Beall*, 6 Wheat. 104; *Osborn* v. *Moncure*, 3 Wendell, 170; *Bixby* v. *Franklin Ins. Co.* 8 Pick. 86; *United States* v. *Barker*, 4 Wash. C. C. R. 464; *Townsley* v. *Springer*, 1 Miller's (Louis.) R. 122, 515.

The holder of a dishonored note is excused from giving notice of non-payment to the indorser on the *Fourth of July*. *Cuyler* v. *Stevens*, 4 Wendell, 566.

[4] Reasonable notice, due diligence, &c., are questions of law to be decided by the court, as soon as the facts necessary to the decision are ascertained. *Hussey* v. *Freeman*, 10 Mass. R. 86; *Whitwell* v. *Johnson*, 17 Mass. R. 453; *Atwood* v. *Clarke*, 2 Greenl. 249; *Aymar* v. *Beers*, 7 Cowen, 705; *Davis* v. *Herrick*, 6 Ohio R. 66; *Bank of Columbia* v. *Lawrence*, 1 Peters's Sup. Ct. R. 578; *Taylor* v. *Bryden*, 8 Johns. R. 173; *Bryden* v. *Bryden*, 11 Johns. R. 187; *Furman* v. *Haskin*, 2 Caines's R. 369; *Phillips* v. *M'Curdy*, 1 Harr. & Johns. 187; *Bell* v. *Wardwell*, Willes, 202; *Dodge* v. *Bank of Kentucky*, 2 Marsh. (Kentucky) R. 616; *Noble* v. *Bank of Kentucky*, 3 Marsh. (Kentucky) R. 264; *Ellis* v. *Paige*, 1 Pick. 43; *Haddock* v. *Murray*, 1 N. Hamp. R 140; *Ferris* v. *Saxton*, 1 Southard, 1.

But it will be found in practice, that these questions are in general so involved in new combinations of circumstances and so mixed up with the ingredients of law and fact, that it must be very difficult to retain on the bench the exclusive jurisdiction of them. See *Tindal* v. *Brown*, 1 T. R. 167; *Darbishire* v. *Parker*, 6 East, 3; *Hilton* v. *Shepherd*, 6 East, 14, *in notis*; *Bateman* v. *Joseph*, 12 East, 433; *Chesapeake Ins. Co.* v. *Stark*, 6 Cranch, 273;

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WILLIAM KNIGHTS *versus* SAMUEL PUTNAM.

Usury between the indorser and indorsee in the transfer of a promissory note, cannot be set up in defence to an action by the indorsee against the maker; consequently the indorser cannot be admitted as a witness to prove such usury.

In an action by the indorsee against the maker of a note indorsed in blank, the indorser, although he may have released his claims upon the note, is not a competent witness to prove that it was pledged to the indorsee as collateral security for a debt less than the amount of it.

ASSUMPSIT upon a promissory note made by the defendant, payable to W. Putnam or order, and by him indorsed to the plaintiff. Plea, the general issue.

At the trial, before *Putnam* J., the defendant offered the indorser as a witness, to prove that the consideration of the indorsement was usurious; but he was rejected as incompetent, on the authority of *Manning* v. *Wheatland*, 10 Mass. R. 502.

The indorser had released to the defendant all his claims upon the note, and the defendant offered to prove by him that the note was pledged to the plaintiff as collateral security for a debt much less than the amount of it, contending that the plaintiff ought not to recover more than the amount of such debt. This evidence was considered as irrelevant and was rejected.

A verdict was returned for the plaintiff, but if either of these determinations was incorrect, a new trial was to be granted.

Sept. 27th. The cause was argued for the defendant by *A. Brooks*, who cited *Powell* v. *Waters*, 17 Johns. R. 176; *Fox* v. *Whitney*, 16 Mass. R. 118; and for the plaintiff by *Wells*, who relied on *Manning* v. *Wheatland*, and *Butler* v. *Damon*, 15 Mass. R. 223.

April term 1826, at Greenfield. WILDE J. delivered the opinion of the Court. As to the

Taylor v. *Bryden*, 8 Johns. R. 173; *Field* v. *Nickerson*, 13 Mass. R. 131; *Davis* v. *Herrick*, 6 Ohio R. 66.

In *Brahan* v. *Rayland*, 1 Minor, 85, what is reasonable notice to an indorser, was held to be a question of fact for a jury. See *Robertson* v. *Vogle*, 1 Dallas, 252; *Steinmetz* v. *Currie*, 1 Dallas, 270; *Bank of North America* v *M'Knight*, 2 Dallas, 158; *Ball* v. *Dennison*, 4 Dallas, 165; *Bank of North America* v. *Pettit*, 4 Dallas, 129; *Scott* v. *Alexander*, 1 Wash. 335; *Reedy* v *Seizas*, 2 Johns. Cas. 337.

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question of usury, the case of *Manning* v. *Wheatland* is directly in point. But the authority of that case has been questioned, and the objection to the doctrine, as it was there laid down, is entitled to great consideration.

The witness was held to be incompetent, not because he was interested, but on the ground of legal policy, which will 185
not permit one, who has transferred a negotiable security as valid, to invalidate it by his testimony.[1] But in that case, as in this, there was no illegality in the original contract, and no usury except in the transfer, in which the plaintiff himself was the guilty party. No deception therefore was practised on him. The note was a valid contract; precisely what he supposed it to be at the time of the transfer.

But notwithstanding these objections, we are of opinion that the case of *Manning* v. *Wheatland* was rightly decided. For if the witness was competent, we consider the point to which he was called to testify as immaterial, and that consequently his testimony was properly excluded. We are aware there are conflicting opinions and contradicting decisions on this point, but after examining all the cases we are satisfied that the defendant cannot avail himself of the defence of usury, and that a note, valid in its inception, may be recovered against the maker, by an indorsee, although discounted by him at a rate exceeding legal interest.[2]

It is a well established principle, that if a note or security is valid when made, no usurious transaction afterwards between

[1] *Bank of United States* v. *Dunn*, 6 Peters's Sup. Ct. R. 51; *Widgery* v. *Munroe*, 6 Mass. R. 449; *Jones* v. *Coolidge*, 7 Mass. R. 199; *President &c. of Hartford Bank* v. *Barry*, 17 Mass. R. 94; *Packard* v. *Richardson*, 17 Mass. R. 122; *Fox* v. *Whitney*, 16 Mass. R. 118. See *Stafford* v. *Rice*, 5 Cowen, 23; *Bank of Utica* v. *Hillard*, 5 Cowen, 153; *Tuthill* v. *Davis*, 20 Johns. R. 285; *Hunt* v. *Edwards*, 4 Harr. & Johns. 283. But in an action by the plaintiff against the payee of a note which was indorsed for the accommodation of the maker by the payee, the maker, being released by the defendant, was held to be a competent witness to prove the usury. *Van Shaack* v. *Stafford*, 12 Pick. 565; *Powell* v. *Waters*, 17 Johns. R. 176; *S. C.* 8 Cowen, 669; *Myers* v. *Palmer*, 18 Johns R. 167; *Townsend* v. *Bush*, 1 Connect. R. 260. But see *Chandler* v. *Morton*, 5 Greenl. 374; *Griffith* v. *Reford*, 1 Rawle, 196.

[2] But see *Lloyd* v. *Scott*, 4 Peters's Sup Ct. R. 224; *Lowes* v. *Massaredo*, 1 Stark. R. 385.

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the parties or privies will affect its validity. *Ferrall* v. *Shaen* 1 Saund. 295, Williams's note.[3]

But it is objected, that as the transfer is usurious, the plaintiff's title fails, although the original contract remains good, and that he cannot derive title from an illegal transaction, in which he was a guilty party. This objection would have weight, if a usurious contract were *malum in se* or merely void. But it has been frequently held, that a contract contaminated with usury is only voidable by the party injured or those claiming under him.[4]

Now it is manifest that the maker of a note is not affected by a usurious agreement between the indorser and indorsee. He is liable on his contract, and it is immaterial to him whether the action be brought in the name of the indorser or in that of the indorsee. But I hold further, that the transfer of a note on a usurious consideration is neither void nor voidable. So far as the indorsement operates as a transfer of the note it
186 is an executed contract, and the statute against usury is not applicable. It only applies to the implied promise or guaranty of the indorser, which being an executory contract may be avoided. But in no case can an executed contract be set aside on the plea of usury. It is not, however, necessary to insist on this distinction for the purpose of sustaining the present verdict. It is sufficient for this purpose, that the transfer is voidable only, and that it is not competent for the defendant, he not being a party to the transfer, to avoid it. The note being free from usury between the immediate parties to it, no after transaction with another person can, as respects those persons, invalidate it.[1]

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[3] *Nichols* v. *Fearson*, 7 Peters's Sup. Ct. R. 103; *Gaither* v. *The Farmers and Mechanics Bank of Georgetown*, 1 Peters's Sup. Ct. R. 37; *Merrills* v. *Law*, 9 Cowen, 65; *Tate* v. *Wellings*, 3 T. R. 539; *Pollard* v. *Scholy*, Cro. Eliz. 20; *Gray* v. *Fowler*, 1 H. Bl. 462; *Mathews* v. *Lewis*, 1 Anstr. 7; *Parker* v. *Ramsbottom*, 3 Barn. & Cressw. 257, 270; *S. C.* 5 Dowl. & Ryl. 138, 151; *Gardner* v. *Flagg*, 8 Mass. R. 101; *Thompson* v. *Woodbridge*, 8 Mass. R. 256.

[4] In *Reading* v. *Weston*, 7 Connect. R. 409, it was held that no person other than the *oppressed* party to a usurious contract, can avoid such contract on the ground of usury. But see *Lloyd* v. *Scott*, 4 Peters's Sup. Ct R 224; *Fields* v. *Gorham*, 4 Day, 251; *Lloyd* v. *Keach*, 2 Connect R. 175.

[1] *Nichols* v. *Fearson*, 7 Peters's Sup. Ct. R. 103

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In New York, this principle is fully established by repeated decisions. The cases of *Bush* v. *Livingston*, 2 Caines's Cas. in Err. 66, and *Braman* v. *Hess*, 13 Johns. R. 52, and *Munn* v. *Commission Company*, 15 Johns. R. 44, are directly in point.[2] The only case which has been decided on a contrary doctrine is that of *Lloyd* v. *Keach*, 2 Connect. R. 175. It is somewhat remarkable, that in this case and in the case of *Munn* v. *Commission Co.* it is said the point under consideration was too clear to be questioned, although the two decisions are directly contradictory. The cases referred to by *Gould* J. as establishing the principle laid down in the case of *Lloyd* v. *Keach*, do not appear to me at all decisive. It is true in those cases the law seems to be taken for granted as it is laid down by the learned judge in the case of *Lloyd* v. *Keach*. But he does not appear to have taken into consideration an important distinction in relation to these cases, between notes or bills given on a valuable consideration, and in the usual course of business, and accommodation notes or bills, made for the purpose of raising money, and not existing as valid contracts before they are discounted. The distinction is noticed and the law correctly stated by *Spencer* J. in the case of *Munn* v *Commission Co.* He says "it is clear, that if a bill or note be made for the purpose of raising money upon it, and it is discounted at a higher premium than the legal rate of interest, and where none of the parties whose names are on it, can, as between themselves, maintain a suit on the bill when it becomes mature, provided it had not been discounted; that then such 187
discounting of the bill would be usurious and the bill would be void." The reason of the distinction is obvious. In the case supposed the bill or note is mere waste paper before it is discounted; it is then that it first exists as a contract, and if tainted with usury, it is voidable even in the hands of a *bonâ*

[2] A note valid in its inception may be bought and sold in New York, as a chattel, at its value, real or supposed. *Kent* v. *Walton*, 7 Wendell, 256; *Cram* v. *Hendricks*, id. 569. So in South Carolina, *Odell* v. *Cook*, 2 Bailey, 59. See also *Foltz* v. *Mey*, 1 Bay, 486; *King* v. *Johnson*, 3 M'Cord, 365. In Virginia the fair sale of a bond at any discount, is held not to be usurious. *Hansbrough* v. *Baylor*, 2 Munf. 36; *Whitworth* v. *Adams*, 5 Randolph, 333; *Kenner* v *Hord*, 2 Hen. & Munf. 14

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fide holder.[1] The cases of *Jones* v. *Brooke*, 4 Taunt. 464 and the case of *Churchill* v. *Suter*, cited by *Gould* J., fall within this class of cases, and whether the other cases referred to were business notes or bills, or were made for the purpose of raising money, does not appear. Besides, these are *nisi prius* cases, and not at all decisive, nor can opinions incidentally expressed, and in support of which no reasons are given, be entitled to much weight of authority.

In the case of *Parr* v. *Eliason*, 1 East, 92, it was decided that a bill, free from usury in its concoction, may be sold at a discount greater than the legal rate of interest, without avoiding the bill in the hands of a *bonâ fide* holder. That was an action of trover, and it seems to be implied that if it had been brought against the immediate indorsee, who was a party to the usurious transfer, it might have been maintained. But this is decided only by inference, and it was a point not involved in the decision of that case. But if the inference be admitted to be just, it does not follow that the maker of the bill can take advantage of the usury. If the transfer was voidable only, and Lord *Kenyon* clearly so considers it, for he likens it to a sale which is fraudulent against creditors, I see no legal reason why the maker of the note should be allowed to avoid it. If however the transfer is merely void, as *Gould* J. contends, then the case of *Parr* v. *Eliason* cannot be supported, for the *bonâ fide* holder in that case had no right to the bill. The transfer being void is a mere nullity, and it was immaterial whether the holder was or was not a party to the usurious transfer. This is the necessary legal consequence of considering the transfer as absolutely void ; it is opposed to the current of the English authorities, and cannot be maintained either on principle or authority.[2]

As to the other point, we think the witness rightly rejected.
188 The indorsement being unqualified in terms is not to be qualified

[1] *Sauerwein* v. *Brunner*, 1 Harr. & Gill, 477; *Odell* v. *Cook*, 2 Bailey, 59; *Dewes* v. *Eastham*, 2 Yerger, 463; *Powell* v. *Waters*, 8 Cowen, 690; *Nichols* v. *Fearson*, 7 Peters's Sup. Ct. R. 103; *Thomas* v. *Catherall*, 5 Gill & Johns. 23. But see *Whitworth* v. *Adams*, 5 Randolph, 333.

[2] The courts of Kentucky have recognised the validity of a transfer between the assignor and the assignee, of a bond, in a case of admitted usury *Littell* v. *Herd*, Hardin, 82.

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or restricted by the testimony of the indorser, establishing an interest in the note in himself or in his assignee. It would be a dangerous proposition to maintain that the holder of a note indorsed absolutely or in blank should be liable to have it thus impeached.

If the note were pledged, and the indorser is entitled to a surplus, an action will lie in his name to recover it, but such a right cannot be established by his own testimony accompanied with a release to the defendant in order to affect the plaintiff's legal title to the note.

Judgment according to verdict.

Roderick Palmer *et al. versus* Miner Stebbins.

A bond conditioned that the obligor shall give the obligee all the freighting of the obligor's goods up and down the Connecticut river, at the customary price, to be paid in goods at the usual price, and that he shall not encourage any other boat man to compete with the obligee in the business of boating, is not void as being in restraint of trade, and is founded on a sufficient consideration

This was an action of debt on a bond for 600 dollars, the condition of which, as set forth on oyer, was as follows: — "The condition of the foregoing deed is this, that if the said Miner shall from this time cease to have any concern in the business of boating on Connecticut river, and shall give them all the freighting of his goods, wares and merchandise up and down Connecticut river, at the customary freight, and to be paid in goods at the usual price, and shall aid and countenance them in their business, and shall not directly or indirectly promote any other boatman to compete with them in the business of boating, then the bond to be void," &c.

The defendant pleaded performance generally. The plaintiffs replied, assigning as a breach, that the defendant did encourage other boatmen (naming sundry persons) to compete with the plaintiffs. The defendant demurred specially, but on the argument waived the causes of demurrer.

The cause was spoken to at this term, but was afterwards argued in writing by *E. H. Mills*, *Rice* and *J. H. Ashmun* 189

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for the defendant, and by *Dwight* and *Bliss* junior for the plaintiffs.

For the *defendant* it was contended, that the bond was void, as being in restraint of trade, and so against the policy of the law. The defendant is to cease himself from boating, and is to employ and encourage no other person in that business except the plaintiffs. The bond, to be sustained, should restrain the defendant only within reasonable limits, and upon a just consideration appearing either on the face of the bond or in the pleadings. Here the restraint extends to the whole of the Connecticut river, a distance of nearly 300 miles, and is not founded on any consideration. *Mitchel* v. *Reynolds*, 1 P. Wms. 181; *Pierce* v. *Fuller*, 8 Mass. Rep. 223; *Chesman* v. *Nainby*, 2 Str. 739; *Clerk* v. *Comer*, Cas. Temp. Hardw. 48; *Davis* v *Mason*, 5 T. R. 118; *Colgate* v. *Bachelor*, Cro. Eliz. 872.

For the *plaintiffs* it was said, that whether a bond in restraint of trade is so general as to be contrary to the policy of the law, depends on the nature of the occupation to be restrained. The reason why such a bond is void is, because it goes beyond the sphere of operations of the obligee, and so affects the community injuriously by discouraging trade. *Mitchel* v. *Reynolds*, 1 P. Wms. 190. The business of boating on the Connecticut river necessarily requires a sphere of operations as extended as the terms of this bond. If the restriction is limited to reasonable bounds, however extensive, provided it do not embrace the whole country, the bond will not be void for generality. *Gunmakers' Company* v. *Fell*, Willes, 384; *Davis* v. *Mason*, 5 T. R. 118; *Bunn* v. *Guy*, 4 East, 190; *Pierce* v. *Fuller*, 8 Mass. R. 223; *Perkins* v. *Lyman*, 9 Mass. R. 522; *Stearns* v. *Barrett*, 1 Pick. 443. The case of *Colgate* v. *Bachelor* was not determined on the ground of generality.

Taking the whole condition together, it shows a sufficient consideration. The contract on the part of the plaintiffs is to do the defendant's freighting at the customary price, to be
190 paid in goods at the cash price, and the law will presume that a counter bond to that effect was given to the defendant. *Chesman* v. *Nainby*, 2 Str. 744. Any valuable considera

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tion, however small, is sufficient to sustain a contract of this sort. *Bragg* v. *Tanner*, cited in Cro. Jac. 597; *Davis* v. *Mason* and *Pierce* v. *Fuller* before cited.

But supposing the contract to be void for want of a sufficient consideration, so far as it restrains the defendant himself from engaging in the business of boating, the objection does not apply to the other parts of the condition; and one of the obligations of a bond may be void at common law, and the bond still be binding as to the rest. *Norton* v. *Simmes*, Hob. 14; *Pigot's case*, 11 Co. 27 *b*; *Chesman* v. *Nainby*, 2 Ld. Raym. 1459, and 2 Str. 742; *Greenwood* v. *Bp. of London*, 5 Taunt. 727; *Newman* v. *Newman*, 4 Maule & Selw. 70.

In reply, it was said, that the restriction might be considered as a general one, because in fact, though not in terms, it embraces the whole commonwealth, or a limited one, the limits of which are clearly unreasonable; and in either case the bond is void. 1 P. Wms. 182; 8 Mass. R. 223. In *Bunn* v. *Guy* no question was agitated as to the validity of the restriction. In *Pierce* v. *Fuller* and *Perkins* v. *Lyman*, the occupations restrained were of a very limited nature, so as scarcely to admit of more than one person's engaging in them. In *Stearns* v. *Barrett* the parties were joint owners of a patent right, the whole of which might be sold, and the sale of half therefore was very reasonably sustained. The restriction here, besides being unreasonable in its extent, is unlimited in its duration; and this objection is fatal to the bond.

The necessity of a consideration is admitted, but it is said that the plaintiffs bound themselves to do the defendant's freighting, and that their bond will be presumed from their acceptance of the defendant's bond. It is very clear that this was not in fact the consideration, and it will not be held to be a fair and sufficient one. In *Chesman* v. *Nainby* the plaintiff, on receiving an apprentice, gave up the usual fee of £100 in consideration of the restriction. The objection was made that the plaintiff was not bound, and the Court said they would presume 191
that he was. But here the Court are asked to presume the consideration itself; to presume what all the authorities require should appear.

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The defendant does not deny that a bond may be void in part only, but the part here which the plaintiffs suppose to be good, is liable, equally with the rest of the bond, to the objection of being in restraint of trade. Any act by which any boatman should derive assistance in his business from the defendant, as the loan of money, the employment of his boat, or the recommendation of his business, would "directly or indirectly promote him to compete" with the plaintiffs, and would be a breach of the bond. The replication simply avers that the defendant did promote a competition. It does not allege that the boatmen encouraged ever did any act in consequence of such promoting; that any competition ever took place; or that the plaintiffs ever suffered any inconvenience whatsoever. The law does not recognise such useless and unnecessary covenants. It permits a little restraint on trade, and that reasonable in its nature and extent and on good consideration.

May term 1826, at Springfield.

Wilde J. delivered the opinion of the Court. [After stating the facts.] So that the only question is, whether the breach is well assigned, and whether the condition, as to this part of it, is valid in law; for it is admitted that if it is, it is not vitiated by any illegality in the other stipulations in the condition.

The question then is, whether any agreement which may be supposed to discourage competition in trade, is unlawful, and is such a restraint of trade as is inconsistent with public policy.

In the case of *Mitchel* v. *Reynolds*, 1 P. Wms. 181, *Parker* C. J. lays down the reasons why restraints of trade are not allowed.

"The true reasons," says he, "of the distinction upon which the judgments in these cases of voluntary restraints are founded, are 1st, the mischief which may arise from them first to the party, by the loss of his livelihood, and the subsistence of his family; secondly, to the public, by depriving it of a useful member."

192 "Another reason is, the great abuses these voluntary restraints are liable to; as for instance, from corporations, who are perpetually laboring for exclusive advantages in trade, and

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to reduce it into as few hands as possible. As likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, were they to set up for themselves."

"3dly, Because in a great many instances, they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London, what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other."

"4thly, The fourth reason is in favor of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being overstocked with any particular trade."

These are the principal reasons given for the rules of law in respect to the restraint of trade by voluntary contract, and nothing important can be added from the later cases on the subject. They were collected to a recent date by Chitty in his Digest of laws relating to commerce, and none of them have much bearing upon the question under consideration.

It must therefore be decided on general principles, rather than by express authority. Whether competition in trade be useful to the public or otherwise, will depend on circumstances. I am rather inclined to believe, that in this country at least, more evil than good is to be apprehended from encouraging competition among rival tradesmen or men engaged in commercial concerns. There is a tendency, I think, to overdo trade, and such is the enterprise and activity of our citizens that small discouragements will have no injurious effect in checking in some degree a spirit of competition. An agreement with a tradesman to give him all the promisor's custom or business, upon fair terms, and not to encourage a rival tradesman to his injury, can hardly be considered as a restraint 193
of trade. Certainly it is not such a restraint as would be injurious to the public, for in proportion as it discourages one party it encourages another. As to the public therefore such a contract *stat indifferenter*. It would be extravagant to sup-

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pose that any one, by multiplying contracts of this kind, could obtain a monopoly of any particular trade. But admitting that such a contract is a restraint of trade, yet it is clearly a limited restraint, and is not binding by the terms of it beyond the sphere of the obligee's actual business. Such a particular restraint made by voluntary contract on good consideration, is valid in law.[1] And the consideration appearing by the condition in this case is as we think a reasonable one, and sufficient to support this part of the agreement. The plaintiffs agreed on their part to do all the defendant's freighting up and down Connecticut river, at the customary freight, and to be paid in goods at the usual price. This agreement on the plaintiffs' part is to be inferred by their acceptance of the bond, in which the defendant agrees to give them his freighting, and to aid and countenance them in the business of boating, and not to promote any other boatman to compete with them in the business of boating This seems to be a fair and equal bargain, founded on a good and adequate consideration. If there is any in-

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[1] Story on Equity, 289, 290; Chitty's Contracts (3d Amer. ed.) 217, 218, *Pierce* v. *Woodward*, 6 Pick. 206. It seems that no exact limits can be fixed upon in such cases. The consideration for, as well as the extent of, the restraint, must be taken into the account, and if from a view of these the restraint appears greater than is necessary for the protection of the party, who imposes it, in the full enjoyment of his trade, or is otherwise unreasonable, the agreement creating such restraint cannot form the subject of an action. *Horner* v. *Graves*, 7 Bingh. 735; *S. C.* 5 Moore & Payne, 768; *Hayward* v. *Young*, 2 Chit. R 407; *Young* v. *Timmins*, 1 Tyr. Exch. R. 226; *S. C* 1 Crompt. & Jerv. 331; *Horner* v. *Ashford*, 11 Moore, 91; *S. C.* 3 Bingh. 322; *Bryson* v. *Whitehead*, 1 Sim. & Stu. 74; *Chesman* v. *Nainby*, 1 Bro. P. C. 234; S. P. *Morris* v. *Colman*, 18 Ves. jun. 438; *Prugnell* v. *Gosse*, All. 67; *Hunlocke* v. *Blacklowe*, 2 Saund. R. 156; *Davis* v. *Burney*, 2 Gill & Johns. 382; *Dakin* v. *Williams*, 11 Wendell, 67.

An agreement on the part of a turnpike corporation to grant to individuals the privilege of passing the gate free of toll, in consideration that they would withdraw their opposition to the passage of a legislative act, touching the alteration of the road, was held to be against sound policy and prejudicial to correct and just legislation, and void. *Pingry* v. *Washburn*, 1 Aiken's R. 264. An agreement which contravenes the policy of an act of Congress and tends to defraud the United States, is void. *Gulich* v. *Ward*, 5 Halst. 87. See also *Sharp* v. *Terse*, 4 Halst. 352; *Hosmer* C. J. in *Preston* v. *Bacon*, 4 Connect. R. 480. A contract to reprint any literary work in violation of a copy-right secured to a third person, is void. *Nichols* v. *Holly*, 3 Day, 145.

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equality the hardship and inconvenience are evidently on the part of the plaintiffs, who are bound to be ready at all times to take the defendant's freight, however inconvenient it may be to them so to do.

But it is said that this is a useless and unnecessary contract, and therefore not to be enforced by law; that the plaintiffs have not shown in the pleadings any actual damages. But the plaintiffs in assigning a breach are not obliged to set out their claims for damage;[2] it is sufficient to assign a breach, and the breach is in substance well assigned; if there be any formal defect it cannot be taken notice of on general demurrer.

As to the first branch of the condition we do not decide. That may be the subject of further consideration on a hearing in chancery, in which case it may be necessary to ascertain other facts than those appearing on the pleadings. One fact 194
in particular appears to be important, namely, whether the plaintiffs are in fact engaged in boating up and down the river coextensively to the terms of the condition. If not, the question will arise whether a restraint can be valid which can be of no use to the plaintiffs, and which may be prejudicial to the rights of the defendant.[1]

Replication adjudged good.

[2] The damages sustained are matter of evidence, and need not be alleged, nor are they scarcely ever stated, but in a general manner *Barruso* v *Madan*, 2 Johns. R. 149; *Boorman* v. *Nash*, 9 Barn. & Cressw. 145, 152; 1 Chitty's Pl. (6th Amer. ed.) 370.

[1] The proper question in such cases is, whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is granted, and not so large as to interfere with the interests of the public. *Horner* v. *Graves*, 7 Bingh. R. 735; *Pierce* v. *Woodward*, 6 Pick. 206

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COMMONWEALTH *versus* JAMES MOORE.

Upon a complaint under *St.* 1785, *c.* 66, § 2, (Revised Stat. *c.* 49, § 1,) for the maintenance of a bastard child, evidence that the general character of the complainant for chastity, previous to her connexion with the respondent, was bad, and that she had previously had frequent criminal intercourse with other persons, is not admissible for the purpose of impeaching her credit as a witness.

In such a prosecution the complainant entered her complaint in the Court of Common Pleas by attorney, but pleaded by guardian; and upon *certiorari* after judgment it was presumed that she was of age, the contrary not appearing and not being inferrible from her pleading by guardian.

Such a complaint purporting to be made pursuant to the statute, but not concluding with *contra formam statuti*, was held sufficient.

If a case is brought before this Court by exceptions to the directions of the Court of Common Pleas and this Court refuses to take cognizance of the exceptions, it is competent to the Court of Common Pleas to bring the case forward by entering the continuances, and to enter up judgment.

Upon *certiorari* it will be presumed, in favor of such judgment, that the case was not brought forward without notice to the party who took the exceptions, nothing to the contrary appearing on the record

AT the Court of Common Pleas holden at Springfield in March 1824, a complaint was made, pursuant to *St.* 1785, *c.* 66, § 2, by Sally S. Gile against Moore, as the father of a bastard child of which she had been delivered. A trial was had at the succeeding term in August, and a verdict was returned against the respondent. He thereupon excepted to the directions of the judge, but this Court, at September term 1824, refused to take cognizance of the exceptions. [See 2 Pick. 386.] The Court of Common Pleas afterward ordered the action to be brought forward and the continuances to be entered, and the respondent was adjudged to be the reputed father of the child, and an order was passed that he should pay certain sums to the mother for its maintenance.

195 And now upon the return of a *certiorari* to the Court of Common Pleas, *E. H. Mills* and *Boies*, for the respondent, objected, 1 that the complainant presented her complaint and appeared by attorney, although she was under twenty-one years of age. [*Parker* C. J. Does it appear by the record that she was an infant?] It is a sufficient answer to that question, that she pleaded by guardian and the reason of appointing a guardian, which ought to be shown, does not appear. 2. At the term of the Court of Common Pleas in August 1824, the

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cause was removed to this Court, and thereupon all proceedings in the lower Court were discontinued, and it ceased to have any further cognizance of the cause; nevertheless, at March term 1825, without giving Moore any notice, or any opportunity to be heard, it proceeded to adjudge and order as above mentioned. Because the action was brought here improperly, by mistake of the counsel, it does not follow that the lower Court retained any control over it. The clerk's bringing it forward on his docket was irregular, and of no effect. It will be contended that it was continued under a general order, that all matters not finally acted on by the court should be continued; but it does not appear that any such general order was passed. It was irregular to proceed without notice to the respondent, since he had a right to be heard in regard to the amount to be allowed to the complainant. 3. The complaint is founded on a penal statute, and it is defective in not alleging at the conclusion, that the offence was against the form of the statute. 4. On the trial, the respondent offered to prove that the general character of S. S. Gile, the complainant and witness in the prosecution, for chastity, was bad, and had been so for a long time previous to her alleged connexion with the respondent, and that for a long time previous other persons had had frequent criminal intercourse with her. This evidence was improperly rejected. The party herself was a witness, made so by the statute, and the Court will not suffer the common law to be infringed any further than the statute absolutely requires. The evidence rejected ought to have been received as well for the purpose of impeaching her credit, as of showing that the respondent was not the father of the child. In an action by a parent for 196
debauching a daughter, where she is a witness, evidence of her general reputation for chastity, or of particular instances of unchastity, is admissible

Bates contrà. 1. It does not appear that the complainant was an infant, and if it did, by joining issue on the merits the objection is waived. There is a distinction between an infant plaintiff and an infant defendant, in respect to appearing by attorney. *Foxwist* v. *Tremaine*, 2 Saund. 212; 1 Chit. Pl. 437; *Schermerhorn* v. *Jenkins*, 7 Johns. R. 373.

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Commonwealth v. Moore.

2. This Court having dismissed the exceptions, the cause stood in the same situation as if no exceptions had been filed. It is said that the general order for continuances does not appear; but as it is the constant usage of the Court of Common Pleas to pass such an order, it may be assumed that it was done in this instance. If however there was no general order, the court had power to make a special order to bring the case forward. Com. Dig. *Pleader V*, 4. It is to be presumed that the respondent had notice, the contrary not appearing on the record. 3. If it was necessary to set forth that the prosecution was founded on the statute, it is so alleged in the complaint. 4. The statute makes the party a witness and her testimony is to be impeached like that of other witnesses. Evidence of her criminal intercourse with other persons within the period in which she might become pregnant, was admitted, because it would show that she could not know who was the father of her child. In an action for debauching a daughter evidence of her previous unchastity is received in mitigation of damages, and not to impeach her credibility. *Commonwealth* v. *Murphy*, 14 Mass. R. 387, applies only to the case of a common prostitute's being offered as a witness; and see *Jackson* v. *Lewis*, 13 Johns. R. 504.

May term 1826, at Springfield.

WILDE J. delivered the opinion of the Court. The evidence offered by the defendant below, to impeach the credit of the principal witness, was, we think, properly rejected. Evidence to impugn the character of a witness is commonly to be confined to his general character for veracity. In the case of *Commonwealth* v. *Murphy*, 14 Mass. R. 387, the

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inquiry was further extended;[1] but public justice does not require a still greater relaxation of the general rule. Besides, the evidence rejected was immaterial, the witness's character for chastity being sufficiently impeached by her own confes-

[1] 2 Stark. Ev. (late ed.) 216, n. 1. A witness may be impeached by showing that he was intoxicated at the time the events occurred to which he is called to testify. *Tuttle* v. *Russell*, 2 Day, 201. General character for drunkenness is not admissible. *Aliter*, as to the fact. *Brindle* v. *M'Ilvaine*, 10 Serg. & Rawle, 282; Roscoe on Crim. Evidence, 135, 136.

Neither is the complainant bound to answer the question, whether she has had intercourse with another man, who might have been the father of the child. *Tilson* v. *Bowley*, 8 Greenl. 163.

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·on; so that if the evidence had been admitted, it would have made no difference in the verdict. *Rex* v. *Teal*, 11 East, 311. The evidence however was clearly inadmissible.

Another error assigned is, that the complainant, being a minor, nevertheless appeared by attorney; but the fact that she was a minor does not appear, and is not to be inferred from her pleading by guardian, because a guardian might have been appointed for some other cause besides minority.[2]

Nor is it error that the complaint does not conclude *contra formam statuti*.[3] This was not a prosecution for a penalty, but one of a peculiar character;[4] and it is sufficient that all the requisitions of the statute, as to the form of the proceedings, have been complied with. The accusation, examination and complaint, are all in common form, and such as have been sanctioned by long established practice.

As to the supposed discontinuance of the suit, we are of opinion that it was competent for the Court to order the continuances to be entered, and that the proceedings in this respect are legal and regular. The claim of the defendant below to remove the cause, as by appeal, into this Court, and the proceedings thereon, were a nullity. When this Court refused to take congizance of the action, it became the duty of the Court below to enter judgment.[5]

But it is objected, that the process could not be brought

[2] But if an infant appear in person and not by guardian or prochein ami, it is error in fact. *Castledine* v. *Mundy*, 1 Nev. & Man. 635; *S. C.* 4 Barn. & Adol. 90.

[3] See *Reed* v. *Northfield*, 13 Pick. 94. *Quære*, whether the words "*contra formam statuti*," can be supplied by any other words of equivalent import. *Barter* v. *Martin*, 5 Greenl. R. 76; *M'Keon* v. *Caherty*, 1 Hall 300; *Thistlewood* v. *Cracroft*, 1 Maule & Sel. 500. But see *Att.-General* v. *Rattenburg*, 9 Price, 397; *Commonwealth* v. *Stockbridge*, 11 Mass. R. 279; *Commonwealth* v. *Caldwell*, 14 Mass. R. 330.

The omission of the words "*contra formam statuti*," when proper to be inserted, is fatal even after verdict. *Lee* v. *Clarke*, 2 East, 333; *Myddelton* v. *Wynn*, Willes. 599; *Thistlewood* v. *Cracroft*, *ubi supra*; *Welles* v. *Iggulden*, 3 Barn. & Cresw. 186.

[4] A complaint by a woman under the bastardy act, (*St.* 1785, *c.* 66; Revised Stat. *c.* 49;) accusing a man of being the father of her bastard child, though in some respects in the form of a criminal prosecution, is in substance and effect a civil suit. *Wilbur* v. *Crane* 13 Pick. 284.

See Howe's Pract. 400.

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forward, and the continuances duly made, without notice to the defendant. It does not however appear by the record that notice was not given; and in favor of a judgment it is to be presumed that the proceedings were regular, nothing to the contrary appearing on the record. It is not necessary that there should be any record of the notice.

Therefore, as no error appears on the record, the proceedings must be affirmed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF WORCESTER, OCTOBER TERM 1825, AT WORCESTER.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON,

The Inhabitants of WESTERN *versus* The Inhabitants of LEICESTER.

To gain a settlement under *St.* 1793, *c.* 34, [see Revised Stat. *c.* 45, § 1,] by having an estate of inheritance or freehold of the clear yearly value of ten dollars and taking the rents and profits thereof three years successively, it is necessary that there should be an actual annual income, and that it should be each and every of the three years of the value of ten dollars.

THIS was an action to recover expenses incurred in the support of Matthew Watson, a pauper whose settlement was alleged to be in Leicester. The defence was, that Watson had gained a settlement in Montville, in Maine, before the separation of that State from Massachusetts, according to the provision in *St.* 1793, c. 34, that "any person &c., having an estate of inheritance or freehold in the town, &c., of the clear yearly income of three pounds [ten dollars], and taking the rents and profits thereof three years successively, &c., shall thereby gain a settlement therein."

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Western v. Leicester

At the trial, which was before *Lincoln* J., the defendants proved, that Watson purchased an estate in Montville in January 1808, for 300 dollars, and sold the same in May 1811, for 1000 dollars. The counsel for the defendants requested the judge to instruct the jury, that in estimating the value of the yearly income they might take into consideration the increased and increasing value of the estate, arising from its local situation. But, on the contrary, he instructed them, that they must determine the question upon the evidence of the real value of the income, and that this income by the rents and profits of the estate must, each and every of the three years, be of the amount of at least ten dollars.

The defendants filed exceptions to these instructions.

Oct 5th. *N. P. Denny* for the defendants.

Newton and *Mansfield*, *e contrà*, after citing *Groton* v. *Boxborough*, 6 Mass. R. 50, and *Conway* v. *Deerfield*, 11 Mass.

Oct. 8th. R. 327, were stopped, the Court being clear that the instructions of the judge were correct on both points.[1]

DANIEL DENNY *et al. versus* THOMAS W. WARD.

Partnership property was attached upon a writ containing the names of three only out of four surviving partners, and the next day the name of the fourth was inserted and a new attachment made upon the same property; but in the mean time another creditor had attached the property upon a writ against the four partners. *Held*, that the first attachment was vacated as against the second attaching creditor.

THIS case came before the Court upon a statement of facts.

On the 9th of November, 1822, the plaintiffs sued out a writ of attachment against J. Leland, J. Morse, S. Hutchinson and L. Morse as surviving partners of N. F. Morse, and delivered it to D. Sherman, a deputy of the defendant, who was then sheriff of this county, and Sherman on the same day at one o'clock P. M. attached property of Leland and the rest

[1] *Orleans* v. *Chatham*, 2 Pick. (2d ed.) 29, note 2; *Granby* v. *Amherst*, 7 Mass. R. 3; *Mansfield* v. *Pembroke*, 5 Pick. 449; *Middleborough* v. *Clark* 2 Pick. 28.

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as such surviving partners, and returned the attachment on the writ. On the day previous Sherman had attached the same property on a writ in favor of Joel Carter against the same defendants, excepting L. Morse, as surviving partners of N. F. Morse, and on the 9th of November, after the attachment on the writ of the plaintiffs, Carter altered his writ by inserting the name of L. Morse, and Sherman again attached the property upon Carter's writ so altered, and returned his doings, and the circumstances of such alteration, upon each of the writs. The plaintiffs and Carter recovered judgment upon their respective writs and duly delivered their executions to Sherman, who sold the property attached, and applied part of the proceeds in full satisfaction of Carter's execution, and the residue in part satisfaction of the plaintiffs' execution.

J. Davis and *A. Denny* for the plaintiffs. The writ, as altered, was the commencement of the action in which Carter recovered his judgment, and his first attachment was void, at least so far as regards a subsequently attaching creditor. *Willis* v. *Crooker*, 1 Pick. 204; *Danielson* v. *Andrews*, ibid. 156; *Brigham* v. *Este*, 2 Pick. 420. The writ against three only might have been abated, upon a plea in abatement; and if it should not have been, the partnership property could not have been applied in satisfaction of the judgment in prefer ence to the plaintiffs' judgment. *Pierce* v. *Jackson*, 6 Mass. R. 242.

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Hoar and *Ward contrà*. The alteration of the writ did not vacate the attachment, because the judgment would have been for the same amount whether the alteration had been made or not; so that subsequently attaching creditors would not be affected by the alteration. This case therefore differs from those first cited. It is said that the first writ might have been abated; the Court however would have granted leave to amend. [*Parker* C. J. I doubt if this was a subject of amendment; it was making new parties.[1]] That might be said if the part nership name had not been given; which would enable the

[1] This subject is now regulated by the Revised Statutes, so that new defendants may be brought in and added, after the suit has been commenced against another or others, without depriving the plaintiff of the benefit of any attachment made or bail taken. Revised Stat. *c.* 100.

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Denny v. Ward.

Court to see what the party intended and thus prevent fraud. Where there is a dormant partner, if he is not sued with the other partners, the plaintiff may nevertheless take the partnership property. It is for the Court to consider, whether a replication to a plea in abatement, stating that the plaintiff did not

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know of the dormant partner, would not be sustained. If it would, the alteration is immaterial. The plaintiffs should show that Carter knew that L. Morse was a co-partner with the defendants named in his writ at first.

Davis, in reply, said that in the facts agreed it was not stated that L. Morse was a dormant partner, but the contrary was to be inferred.

Oct. 8th. *Per Curiam.* It is clear that the first attachment was vacated. Carter's writ as it stood when first served might have been abated for the non-joinder of L. Morse, and the alteration ought not to be allowed to injure a subsequently attaching creditor.[1]

Judgment for the plaintiffs.

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[1] See *Vancleef* v. *Therasson*, *ante*, 14, note 1; *Brigham* v. *Este*, 2 Pick. (2d ed.) 425, note 2; *Bell* v. *Austin*, 13 Pick. 90. In assumpsit against two or more, the plaintiff cannot amend by striking out the name of one of the defendants. *Redington* v. *Farrar*, 5 Greenl. R. 379. Neither in a writ of entry will the court grant leave to amend by striking out the name of one of the demandants, which has been improperly inserted. *Treat* v. *M'Mahon*, 2 Greenl. 120. See *Peck* v. *Sill*, 3 Connect. R. 157; *Ross* v. *Bates*, 2 Root, 198; *Freeman* v. *Beadle*, 2 Root, 492; *Minor* v. *Woodbridge*, 2 Root, 274; *Waldo* v. *Spencer*, 4 Connect. R. 71; *Burrows* v. *Stoddard*, 3 Connect. R. 431; *Burnham* v. *Savings Bank*, 5 N. Hamp. R. 573; *Sherman* v *Proprietors of Connecticut River Bridge*, 11 Mass. R. (Rand's ed.) 338. But by Revised Stat. *c.* 100, § 7, in any action, founded on contract, brought against several persons, the plaintiff may discontinue as against any of the defendants, and proceed against the others.

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AMBROSE WHITING *versus* JOHN EARLE, Principal, and WILLIAM H. HOWARD, Trustee.

Where a minor son makes a contract for his services on his own account, and his father knows of it and makes no objection, there is an implied assent that the son shall have his earnings; so that, unless there is a design to defraud the father's creditors, the son's employer will not be liable in a process of foreign attachment as the father's trustee.

HOWARD, in his answer, stated, that at and before the time of the service of the writ, Enoch Earle, a son of John, and then under age and living in his father's family, was in the respondent's employment, having been hired at the rate of one dollar per day and his board; that at the time mentioned 48 dollars were due for his wages and board, he having boarded in his father's family; that the respondent made the contract with the son, and had never had any conversation with the father on the subject.

In answer to interrogatories put by the son, who moved that he might be allowed to become a party to this suit, the respondent said, that since the service of the writ he had bee informed by the father, that before the son was employed by him, the father had given him his time and relinquished al right to receive payment for his services, in order to enable him to support himself; that accordingly the son had supported himself, made his own contracts, and uniformly paid the father for his board. The respondent further stated, that soon after the service of the writ he was informed by the son, that his father had no claim to his wages. 202

A. Denny contended that Howard ought to be charged as trustee upon his general statement, without regard to his answers to the interrogatories put by the defendant's son. A father's right to the services of his son is not lost by his neglect to support the son; nor by permitting him to make a contract for such services; but in this latter case the son is to be considered as the father's agent. There was no evidence here of an assignment of the son's earnings, and such an assignment to the prejudice of the plaintiff, who was a creditor at the time of the supposed emancipation of the son, would have been fraudulent. *Benson* v. *Remington*, 2 Mass. R. 113; Oct. 6th.

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Whiting v. Earle & Tr.

Nightingale v. *Withington*, 15 Mass. R. 272; Reeve's Dom Relat. 291; *Jenney* v. *Alden*, 12 Mass. R. 378.

J. Davis and *Allen*, *contrà*, relied on *Benson* v. *Remington* and *Nightingale* v. *Withington*; they cited likewise *Adams* v. *Robinson and Tr.* 1 Pick. 462.

Oct. 8th.

PARKER C. J. said, in substance, that although the general principle is clear, that a father is entitled to the earnings of a son while under age, yet the Court thought it equally clear that he might transfer to the son a right to receive them. This is necessary for the encouragement of young men; and it is often convenient for a father wishing to be relieved from the burden of supporting his son, to allow him in this manner to support himself. Where such a contract is entered into without any fraud, for the advantage of the son, on the principles of common justice and according to decided cases, he is entitled to the profits of his own labor.[1] We go so far as to say, that where a minor son makes a contract for his services on his own account, and the father knows of it and makes no objection, there is an implied assent that the son shall have his earnings.

Trustee discharged.

[1] *Burlingame* v. *Burlingame*, 7 Cowen, 92; *Morse* v. *Welton*, 6 Connect. R. 547; *Chilson* v. *Phillips*, 1 Vermont R. 41; *Gale* v. *Parrot*, 1 N. Hamp. R. 28; *Jenny* v. *Alden*, 12 Mass. R. 375; *Angel* v. *M'Lellan*, 16 Mass. R. 28; *Keen* v. *Sprague*, 3 Greenl. 77; *Plummer* v. *Webb*, 4 Mason, 380; *Whipple* v. *Dow*, 2 Mass. R. 415; *Dawes* v. *Howard*, 4 Mass. R. 97; *Freto* v. *Brown*, 4 Mass. R. 675; *Commonwealth* v. *Hamilton*, 6 Mass. R. 273; *Emery* v. *Gowen*, 4 Greenl. 33; *Commonwealth* v. *Murray*, 4 Binn. R. 492; *Eubanks* v. *Peak*, 2 Bailey, 497. See *King* v. *Wilmington*, 5 Barn. & Ald. 525; *Sumner* v. *Jobee*, 3 Greenl. 223.

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ALPHEUS FAY *versus* JOEL BREWER.

Where a mortgagee of a reversion of an estate in dower entered after condition broken, but not before, it was held that he might maintain an action against the tenant for life for waste committed before the breach of the condition.

A tenant for life is answerable for waste committed by a trespasser.

THIS was an action on the case in the nature of waste, for cutting down trees on land assigned to the wife of the defendant as her dower in the estate of her former husband Nathan Newton. The cause was tried before the chief justice.

The plaintiff, through several mesne conveyances from the heirs of Newton, held the reversionary interest in the land by deed of mortgage, made on the 17th of June, 1815, to secure the payment of a sum of money on or before the 17th of June, 1816. He was put in possession in May 1823, by virtue of a writ of *habere facias* issued on a judgment recovered in a suit on the mortgage, having never before entered under the mortgage, and this action was commenced in August following. The acts complained of were done before the plaintiff was so put in possession.

The defendant objected that this action could not be maintained by a mortgagee, until after a foreclosure, or until after an entry for condition broken, or at least not without an entry under the mortgage and actual possession; nor in either case for acts done before possession taken; but the objection was overruled.

The defendant offered to prove that the trees were cut down by other persons, mere trespassers, without his consent or knowledge; but the evidence was rejected.

A verdict was returned for the plaintiff, subject to the opinion of the Court in regard to the foregoing determinations.

E. H. Mills and *J. Davis* for the defendant. 1. Waste will lie only for one who has the immediate estate and inheritance in reversion; Bac. Abr. *Waste*, *G*; Com. Dig. *Waste*, *C*, 2, 3; 3 Bl. Com. 225; and such estate must not be contingent or defeasible, like that of a mortgagee. *Peterson* v. *Clark*, 15 Johns. R. 205. The waste here was done before

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the condition was forfeited; that, however, is immaterial, since after a forfeiture the estate of the mortgagee remains contingent The reversion must continue in the same state when the action is brought, that it was when the waste was committed; otherwise the action cannot be maintained. Co. Lit. 53 *b*; Bac. Abr. *Waste*, *G*. The mortgager has an estate of inheritance, and for waste committed before an entry under the mortgage the remedy should seem rather to belong to him; for before such entry the rights of the mortgagee are limited. *Wilder* v. *Houghton*, 1 Pick. 87; *Hatch* v. *Dwight*, 17 Mass. R. 289, *Starr* v. *Jackson*, 11 Mass. R. 519; *Elliot* v. *Smith*, 2 N. Hamp. R. 432.[1]

2. The evidence excluded should have been admitted. It would be a great hardship on the defendant to make him liable for waste committed by mere strangers without his knowledge.

S. Hoar and *W. Draper*, *contrà*, cited to the first point, *Penniman* v. *Hollis*, 13 Mass. R. 431; *Erskine* v. *Townsend*, 2 Mass. R. 495; *Parsons* v. *Wells*, 17 Mass. R. 419; *Starr* v. *Jackson*, 11 Mass. R. 519; 2 Wms's Saund. 252 *c*; *Brady* v. *Waldron*, 2 Johns. Ch. R. 148;—to the second point, Bac. Abr. *Waste*, *G*, 1; Co. Lit. 54 *a*; *Bray* v *Tracy*, Cro. Jac. 688.

Per Curiam. By an immediate estate of inheritance, as the terms are used in the authorities cited, we understand a reversion without any estate for life intervening; and in this sense a mortgagee may have such an immediate estate. It is well settled that the mortgagee has the whole estate against all but the mortgager, in the same manner as if it were absolute. The case from 15 Johns. R. 205, does not touch this question; and if it did, it could not govern here, since the law of mortgage in New York is so different from our own. It was held in that case, that the mortgagee was not entitled to an action of waste against the mortgager before the forfeiture of the mortgage. Here there is no connexion between the defendant and the mortgager. The reporter however has added a note, that

[1] *Boston Bank* v. *Reed*, 8 Pick. 459. See *Atkinson* v. *Burt*, 1 Aiken's (Verm.) R. 329; *Pope* v. *Biggs*, 9 Barn & Cressw. 245; 4 Kent's Comm 149; Powell on Mortg. (Rand's ed.) 177 946

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an injunction lies against a mortgager to stay waste; and if so, the mortgagee should seem to be entitled to damages against him if waste were actually committed.[1] But it is not necessary to decide that question.

It is clear that a tenant for life is bound to see that trespassers do not injure the estate, and for this purpose the law gives him an action of trespass.[2] So that whether waste is committed by himself or by a stranger, he is alike answerable to the reversioner.[3]

Judgment according to verdict.

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[1] Powell on Mortg. (Rand's ed.) 17 *b*.

[2] 1 Chitty's Pl. (6th Amer. ed.) 72; and the *immediate* reversioner may at the same time support an action on the case against the stranger, if the injury is sufficient to prejudice his right and interest; *Baxter* v. *Taylor*, 1 Neville & Man. 13; and a recovery by one will be no bar to an action by the other. *Jesser* v. *Gifford*, 4 Burr. 2141; *Queen's College* v. *Hallett*, 14 East, 489; *Jackson* v. *Pesked*, 1 Maule & Selw. 234; *Randall* v. *Cleaveland*, 6 Connect. R. 329. It would seem from this, that an action against the trespasser is given to the tenant rather on account of the immediate injury done to his own possession, than because of any injury done to the reversionary estate, or because he is liable to the reversioner for the waste committed.

[3] Actions on the case in the nature of waste, are said in *Greene* v. *Cole*, 2 Wms's Saund. 252 *a*, note 7, and in 3 Bl. Comm. 227, note 7, to have become the most usual actions as well for permissive as for voluntary waste For it is held that the statute of *Gloucester* (6 *Edw.* 1, *c.* 5,) extends an action on the case to permissive as well as to voluntary waste. 2 Inst. 145; Co. Lit. 53 *a*; 2 Roll. Abr. 816; *Pomfret* v. *Ricroft*, 1 Wms's Saund. 323 *b*, note 7. Though this doctrine seems not to have been countenanced in its full extent by later decisions, so far at least as tenants coming in by the act of the parties are affected. See *Gibson* v. *Wells*, 4 Bos. & Pul. 290; *Herne* v. *Bembow*, 4 Taunt. 764; *Jones* v. *Hill*, 7 Taunt. 392; *Countess of Shrewsbury's case*, 5 Co. 14; 3 Bl. Comm. 228, note 9; per Ld. *Tenterden*, 5 Barn. & Cressw. 603; *Hawkins* v. *Sherman*, 3 Carr. & Payne, 462. This action furnishes a more expeditious and easy remedy than the action of waste. By it, however, nothing is recovered excepting damages for the injury done, and costs of suit; *Greene* v. *Cole*, *ubi supra*; 3 Bl. Comm. 227, note 7; *Jefferson* v. *Jefferson*, 3 Lev. 130; *Jesser* v. *Gifford*, 4 Burr. 2141; which last could not be recovered in an action of waste. 2 Wms's Saund. 252, 252 *a*, note 7. But costs in an action of waste are recoverable in New York, by statute. 2 Rev. Stat. of N. Y. 334, 613, § 3. So they are recoverable in this action in Massachusetts. *Padelford* v. *Padelford*, 7 Pick. 155.

In some of the States the law of waste has been considerably modified, and the English doctrines respecting it have been regarded as inapplicable to the condition of this country. See *Findlay* v. *Smith*, 6 Munf. 134; *Jackson* v. *Brownson*, 7 Johns. R. 227; *Hastings* v. *Cruncklelon*, 3 Yeates, 261; *Jackson* v. *Andrew*, 18 Johns. R. 431; *Loomis* v. *Wilbur*, 5 Mason, 13; *Couch* v. *Pur-*

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WILLIAM SMITH *versus* JOHN LANE *et al.*

A husband conveyed his life estate in his wife's land to her father, who afterwards, being insolvent, reconveyed it to the wife, to prevent its being taken by his creditors; one of whom nevertheless extended an execution on the land. It was *held*, that parol evidence was inadmissible to prove that the conveyance to the wife's father was in trust for her use; so that the reconveyance was taken to be fraudulent as against creditors.

TRESPASS *quare clausum fregit.* Plea, soil and freehold in Jacob and Susannah Willard.

The plaintiff claimed by virtue of an extent upon the land on the 27th of April, 1822, as the property of R. Bathrick.

Susannah Wheeler being the owner of the land, in 1807 intermarried with J. Willard, whereby he became seised of a life estate therein. On the 16th of June, 1807, J. Willard conveyed by deed of release and quitclaim to R. Bathrick, father of Mrs. Willard, all his title and interest. The consideration expressed in the deed was 10 dollars. Bathrick lived upon the land and continued to occupy it until the time of the plaintiff's extent. On the 24th of October, 1821, Bathrick, being then insolvent, gave a deed of the land, without covenants of warranty, to Mrs. Willard, for the consideration of 20 dollars, for which sum she gave her note. She knew of the embarrassments of her father, and this deed was made on that account, to prevent the land from being taken by his creditors. She

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year, 1 Randolph, 258; *Jackson* v. *Sellick*, 8 Johns. R. 262; *Bullentine* v. *Payner*, 2 Hayw. 110; *Parkins* v. *Cox*, 2 Hayw. 339; *Elliott* v. *Smith*, 2 N Hamp. R. 430; *Moore* v. *Ellsworth*, 3 Connect. R. 483.

In Massachusetts, however, the doctrines of waste have been maintained in much of their ancient rigor. *Sackett* v. *Sackett*, 5 Pick. 191; *Sargent* v. *Towne*, 10 Mass. R. 303; *Webb* v. *Townsend*, 1 Pick. 21; *Sackett* v. *Sackett*, 8 Pick. 309. This subject is now regulated by the Revised Statutes, so that nothing is recoverable in any case by this action, except the place wasted and single damages and costs. Revised Stat. *c.* 105, § 1. As to tenants in dower, see Revised Stat. *c.* 60, § 15.

For instances of what is to be considered waste in this country, see *Loomis* v. *Wilbur*, 5 Mason, 13; *Padelford* v. *Padelford*, 7 Pick. 152; *Conner* v. *Shepherd*, 15 Mass. R. 164; *White* v. *Willis*, 7 Pick. 143; *Webb* v. *Townsend* 1 Pick. 21; *Sargent* v. *Towne*, 10 Mass. R. 303; *Coates* v. *Cheever*, 1 Cowen 460.

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ved on the land at the time, her father having boarded with her four months.

The defendants offered to prove by parol evidence, that Willard's estate, at the time when he gave the deed to Bathrick, was of much greater value than 20 dollars; that nothing was in fact paid by Bathrick, but that the deed was without consideration; that it was agreed between them that Bathrick should permit Mrs. Willard to occupy the land as if it were her own; that Mrs. Willard remained in possession to the present time; and that the conveyance was made to her by Bathrick, because he held the land in trust for her, and to prevent the property, which was only intended to be held by him for her, from being taken from her to pay his debts. This evidence was rejected.

The defendants also offered in evidence a bond made by Willard to Bathrick, bearing even date with his deed to Bathrick, in which he covenanted "never to exercise any authority over his wife or any property real or personal which she may hereafter acquire or which she now has."

The defendants were defaulted; but if the whole Court should be of opinion that the parol evidence was improperly rejected, or that from a consideration of the conveyances referred to and the facts proved, the defendants could maintain the issue of soil and freehold in J. and S. Willard, the default was to be taken off.

S. Dana and *Shepley* for the defendants. These deeds on the face of them show that Bathrick did not own the land at the time of the extent. The plaintiff then is to get it by proving by parol evidence a fraudulent conveyance; and then comes the question, whether, if the deed to Bathrick is not on the face of it a trust, we may not introduce parol evidence to prove the trust, in order to rebut the parol evidence of fraud. It will be strange if the law will compel the man to be dishonest and to cheat his daughter, when he is willing to be honest and to perform the trust. The consequence of excluding the testimony will be, that no person holding an estate upon a trust not expressed in writing, will be able to give a valid deed to the *cestui que trust*, without a full consideration.

Oct. 6th.

E. H. Mills and *C. Willard* for the plaintiff.

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Smith v. Lane. Oct. 8th.

PARKER C. J. said the Court endeavoured to turn Bathrick's interest into an estate in trust, but found it impossible. He was in possession of the land and conveyed it for a small sum to prevent its being taken by his creditors. This would make the conveyance fraudulent. But it was contended, that the original intent was to secure the property for the daughter; that originally no consideration passed from Bathrick. There was however no writing made to show the trust,[1] though that may probably have been the honest intention of the parties. Judgment must therefore be entered for the plaintiff.

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[1] *Goodwin* v. *Hubbard*, 15 Mass. R. 218; *Runey* v. *Edmands*, 15 Mass. R. 294; *Flint* v. *Sheldon*, 13 Mass. R. 448; *Northampton Bank* v. *Whiting*, 12 Mass. R. 104; *Storer* v. *Batson*, 8 Mass. R. 431; *Bridgman* v. *Green*, 2 Ves. sen. 629; *Watt* v. *Grove*, 2 Sch. & Lef. 500; *Clarkson* v. *Hanway*, 2 P. Wms 203; *Black* v. *Black*, 4 Pick. 234; *Small* v. *Proctor*, 15 Mass. R. 495, *Kempton* v. *Cook*, 4 Pick. 305; *Chadwick* v. *Perkins*, 3 Greenl. 399.

But see *Bullard* v. *Briggs*, 7 Pick. 533; *Jackson* v. *Sternbergh*, 1 Johns. Cas. 153; *Foote* v. *Colvin*, 3 Johns. R. 216; *Jackson* v. *Matsdorf*, 11 Johns. R. 91; *Boyd* v. *M'Lean*, 1 Johns. Ch. R. 582; *Botsford* v. *Burr*, 2 Johns. Ch. R. 409; *Livingston* v. *Livingston*, 2 Johns. Ch. R. 540; *Snelling* v. *Utterback*, 1 Bibb, 609; *Stephenson* v. *Stephenson*, 3 Bibb, 15; *Hart* v. *Hawkins*, 3 Bibb, 506; *Perry* v. *Head*, 1 Marsh. (Kentucky) R. 47; *Stark* v. *Cannady*, 3 Littell, 399; *Phillips* v. *Crammond*, 2 Wash. C. C. R. 441; *Powell* v. *Monson & Brimfield Manuf. Co.*, 3 Mason, 347; *Dean* v. *Dean*, 6 Connect. R. 285; *Dorsey* v. *Clark*, 4 Harr. & Johns. 551; *Willis* v. *Willis*, 2 Atk. 71; *Bartlett* v. *Pickersgill*, 1 Eden, 515; *Lord Anglesey* v. *Lord Altham*, 2 Salk. 676; *Finch* v. *Finch*, 15 Ves. 43; *Young* v. *Peachy*, 2 Atk. 256; *Dealtry* v *Murphy*, 3 Marsh. (Kentucky) R. 477.

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DANIEL MILLS *versus* SETH WYMAN.

The general position, that a moral obligation is a sufficient consideration for an express promise, is to be limited in its application, to cases where a good or valuable consideration has once existed.

Thus, where a son, who was of full age and had ceased to be a member of his father's family, was suddenly taken sick among strangers, and, being poor and in distress, was relieved by the plaintiff, and afterwards the father wrote to the plaintiff promising to pay him the expenses incurred, it was *held*, that such promise would not sustain an action.

THIS was an action of *assumpsit* brought to recover a compensation for the board, nursing, &c., of Levi Wyman, son of the defendant, from the 5th to the 20th of February, 1821. The plaintiff then lived at Hartford, in Connecticut; the defendant, at Shrewsbury, in this county. Levi Wyman, at the time when the services were rendered, was about 25 years of age, and had long ceased to be a member of his father's family. He was on his return from a voyage at sea, and being suddenly taken sick at Hartford, and being poor and in distress, was relieved by the plaintiff in the manner and to the extent above stated. On the 24th of February, after all the expenses had been incurred, the defendant wrote a letter to the plaintiff, promising to pay him such expenses. There was no consideration for this promise, except what grew out of the relation which subsisted between Levi Wyman and the defendant, and *Howe* J., before whom the cause was tried in the Court of Common Pleas, thinking this not sufficient to support 208
the action, directed a nonsuit. To this direction the plaintiff filed exceptions.

J. Davis and *Allen* in support of the exceptions. The Oct. 5th.
moral obligation of a parent to support his child is a sufficient consideration for an express promise. *Andover &c. Turnpike Corp.* v. *Gould*, 6 Mass. R. 40; *Andover* v. *Salem*, 3 Mass. R. 438; *Davenport* v. *Mason*, 15 Mass. R. 94; 1 Bl. Comm. 446; Reeve's Dom. Rel. 283. The arbitrary rule of law, fixing the age of twenty-one years for the period of emancipation, does not interfere with this moral obligation, in case a child of full age shall be unable to support himself. Our statute of 1793, *c.* 59, requiring the kindred of a poor

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person to support him, proceeds upon the ground of a moral obligation.

But if there was no moral obligation on the part of the defendant, it is sufficient that his promise was in writing, and was made deliberately, with a knowledge of all the circumstances A man has a right to give away his property. [*Parker* C. J. There is a distinction between giving and promising.] The case of *Bowers* v. *Hurd*, 10 Mass. R. 427, does not take that distinction. [*Parker* C. J. That case has been doubted.] Neither does the case of *Packard* v. *Richardson*, 17 Mass. R. 122; and in this last case (*p.* 130) the want of consideration is treated as a technical objection.

Brigham, for the defendant, furnished in vacation a written argument, in which he cited *Fowler* v. *Shearer*, 7 Mass. R. 22; *Rann* v. *Hughes*, 7 T. R. 350, note; *Jones* v. *Ashburnham*, 4 East, 463; *Pearson* v. *Pearson*, 7 Johns. R. 26; *Schoonmaker* v. *Roosa*, 17 Johns. R. 301; the note to *Wennall* v. *Adney*, 3 Bos. & Pul. 249; *Fink* v. *Cox*, 18 Johns. R. 145; *Barnes* v. *Hedley*, 2 Taunt. 184; *Lee* v. *Muggeridge*, 5 Taunt. 36. He said the case of *Bowers* v. *Hurd* was upon a promissory note, where the receipt of value is acknowledged; which is a privileged contract. *Livingston* v. *Hastie*, 2 Caines's R. 246; *Bishop* v. *Young*, 2 Bos. & Pul. 79, 80; *Pillans* v. *Mierop*, 3 Burr. 1670; 1 Wms's Saund 211, note 2.

The opinion of the Court was read, as drawn up by

April term 1826.

PARKER C. J. General rules of law established for the protection and security of honest and fair-minded men, who

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may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *foro conscientiæ* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed

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at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some preëxisting obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such preëxisting equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo*; and according to the 210
principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises therefore have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience

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If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the *interior* forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells, to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect,
211 not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the statute of lim

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tations or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value: though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application, to cases where at some time or other a good or valuable consideration has existed.[1]

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessaries, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation upon the father; and it seems to follow, that his promise founded upon such a debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a 212
branch of the mercantile law, which has found it necessary to disregard the point of consideration in respect to instruments

[1] *Cook* v. *Bradley*, 7 Connect. R. 57; *Littlefield* v. *Shee*, 2 Barnw. & Adol. 811; Yelv. (Metcalf's ed.) 4 *a*, note 1; *Parker* v. *Carter*, 4 Munf. 273; *M'Pherson* v. *Rees*, 2 Penrose & Watts, 521; *Pennington* v. *Gittings*, 2 Gill & Johns. 208; *Smith* v. *Ware*, 13 Johns. R. 259; *Edwards* v. *Davis*, 16 Johns. R. 281, 283, note; *Greeves* v. *M'Allister*, 2 Binn. 591; *Chandler* v. *Hill*, 2 Hen. & Munf. 124; Fonbl. on Eq. by Laussat, 273, note; 2 Kent's Comm. (2nd ed.) 465.

Contra, *Glass* v. *Beach*, 5 Vermont R. 172; *Barlow* v. *Smith*, 4 Vermont R. 144; *Commissioners of the Canal Fund* v. *Perry*, 5 Ohio R. 58.

See also *Seago* v. *Deane*, 4 Bingh. 459; *Welles* v. *Horton*, 2 Carr. & Payne, 383; *Davis* v. *Morgan*, 6 Dowl. & Ryl. 42.

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negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 Bos. & Pul. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided, that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged.[1]

For the foregoing reasons we are all of opinion that the nonsuit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.

[1] See *Cook* v. *Bradley*, 7 Connect. R. 57; *Wethersfield* v. *Montague*, 3 Connect. R. 507; *Dover* v. *M'Murphy*, 4 N. Hamp. R. 158

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HENRY A. MILES, by prochein ami, *versus* JOHN BOYDEN, Executor.

S makes a will, bequeathing legacies "to the two oldest children" of M. One of the two oldest at the date of the will dies. S afterwards by a codicil confirms the will, except in some particulars, saying nothing of these bequests. *Held*, that the two oldest children living at the testator's decease, were entitled to the legacies.

An action for a legacy will not lie until after a demand by the legatee upon the executor.

The power of a prochein ami commences with the suit, and he can therefore maintain a suit for such causes of action only as may be prosecuted without a previous special demand; unless the defendant has waived the necessity of a demand.

A father, as natural guardian, is not entitled to demand or receive payment of a legacy to his child; but where a demand by him was resisted by the executor, solely on the ground that the child had no claim to the legacy, it was *held* that the executor had waived the necessity of a demand, and an action by the legatee by his father as prochein ami was sustained.

THIS action, which was *assumpsit* to recover a legacy bequeathed by the defendant's testator, John Stebbings, came before the Court upon a case stated.

On the 12th of June, 1819, Stebbings made his last will, containing among other bequests the following:—"I give and bequeath to the two oldest children of the Rev. John Miles, of Grafton, fifty dollars each;" and directing these and other legacies to be paid within one year after his decease. In February, 1821, he made a codicil, wherein he declared as follows:—"My last will and testament bearing date the 12th of June, 1819, is hereby ratified and confirmed in every part, excepting such part thereof as I hereby annul or alter." No mention was made in the codicil of the bequest to the children of J. Miles.

In July 1821, the testator died, and in September following the will and codicil were duly proved, and the defendant took upon himself the trust of executor.

At the time of making the will there were several children of J. Miles, of whom Mary and John Russell were the two oldest and the plaintiff the third. In December, 1819, John R. died.

No other demand of the legacy in question was made in behalf of the plaintiff, than what is to be inferred from two

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letters of the defendant to J. Miles. In one, dated December 16, 1822, he says: — "I this day received a line from you respecting the legacy which was given to your children by Mr. Stebbings. You inform me that you have consulted the principal lawyers, and that they uniformly give their opinion, that your two oldest children are entitled to the money. I have consulted no one but ——, and I understood them both to say, that in their opinion it was not legally due to you, and that another child could not take the place of that which was one of the oldest when the will was made. It is from such authority that I derive my opinion entirely. If this is not a correct one, the money is at your service, and shall be paid to you without any further trouble on your part. If I should conclude to have you commence a suit, I will give you information, so that you shall have proper time before next court. I will show your line to ——. If he tells me that your two children are entitled to the money, there will be no further delay of the payment of the legacy. My only object is to do the business as the law directs. It is equal to me." In the other letter, dated February 28, 1823, he says that he has made inquiry to his satisfaction, and is without hesitation informed that the legacy of the deceased child is lapsed, and that it would be improper and unlawful for him to pay over the money; and he adds, "If you should see fit to delay the prosecution for further information, it will not delay the decision, for, as I am informed, there can be none till next October."

If the Court should be of opinion that the plaintiff was entitled to recover, the defendant was to be defaulted, and judgment was to be rendered for such sum as the Court should direct.

Oct. 5th, 1824, and Oct. 4th, 1825.

A. Denny for the plaintiff. By the will it was intended that the two oldest children living at the death of the testator should take the legacies. *Dingley* v. *Dingley*, 5 Mass. R. 537; *Lady Lincoln* v. *Pelham*, 10 Ves. 166. And further, by the republication of the will the plaintiff comes within the terms of it under any construction. 6 Cruise's Dig. 144, *tit.* 38, *c.* 7, § 1; *Barnes* v. *Crowe*, 1 Ves. jun. 486.

215 In *Prescott* v *Parker*, 14 Mass. R. 428, which was an

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action on the executor's bond, for not paying a legacy, it was held that a special demand ought to have been made, but there has been no decision that such a demand was necessary in an action for the legacy itself. *Birks* v. *Trippet*, 1 Wms's Saund. 33, note 2. There seems to be no reason why an executor should not be bound to pay a legacy without a special demand, as well as a promissory note made by his testator; and in most of the precedents in Amer. Prec. Declarat. a special request is not inserted. But if a demand might have been required, the defendant has waived his right. The reason of making a demand is to give the executor an opportunity to pay without a suit. Here he resisted payment on the ground that no person was entitled to the legacy. The demand by J. Miles was made in behalf of the plaintiff; if the defendant meant to rely on the insufficiency of it, or on the want of authority in the person making it, he should have stated such objection as the ground of his refusal to pay. *Solomon* v. *Dawes*, 1 Esp. R. 83. Thus a tender in bank bills is good, if the party does not object to the kind of money tendered.

Supposing that a special demand of a legacy is unnecessary, or that the necessity of it is waived, an action by *prochein ami* may be sustained. The *St.* 1783, c. 24, § 17, puts legacies on the same footing with other debts, and the decisions in chancery, that if a legacy is paid to an infant the executor shall pay it a second time, do not apply; and it is apprehended that payment to an infant will be a discharge, as in the case of a payment to him of wages, or of a promissory note, or of damages recovered by him in trespass. *Baker* v. *Lovet*, 6 Mass R. 80.

J Davis for the defendant. By the terms of the will a present legacy was given, and the two oldest children at the time of making it were the legatees. Godolph. 272; *Coleman* v. *Seymour*, 1 Ves. sen. 209; Bac. Abr. *Legacies*, *B*, 2; *Northey* v. *Strange*, 1 P. Wms. 340. By the death of John Russell his legacy lapsed. The codicil makes the same disposition of the legacy as the law had made. It had fallen into the residuary fund, and the codicil confirms it as so lapsed.

No person was duly empowered to receive the money. A payment to the infant himself would be no protection to the

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executor. Toller, 314; *Whopham* v. *Wingfield*, 4 Ves 629; *Phillips* v. *Paget*, 2 Atk. 80. So of a payment to the father as natural guardian. *Dagley* v. *Tolferry*, 1 P. Wms. 285; *Rotheram* v. *Fanshaw*, 3 Atk. 629; *Genet* v. *Talmadge*, 1 Johns. Ch. R. 4. The only mode to be pursued in order to obtain payment, was to have a guardian appointed by the judge of probate. It is said that the chancery decisions on this subject are not applicable. The object of them was to prevent the property of infants from being squandered. If a *prochein ami* may sue for a legacy of 50 dollars, he may for one of any amount whatsoever, and thus a person without any authority, and without giving any security for the appropriation of the property, may make a demand and give a discharge. It is apprehended therefore that the decisions in chancery have a bearing on this case. Nor is the argument drawn from an infant's power to sue in other cases by *prochein ami* well founded. Consequences of too great weight are involved, to permit the application of that principle to the case of legacies; and it is sufficient that this exception has been taken in chancery. The subject was deemed so important, that an act of Parliament was passed to enable executors to pay the money in such cases into the Bank of England.

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PUTNAM J. It is the opinion of the Court, that the testator intended to designate the two children of the Rev. J. Miles *by age*, and not *by name*; and that those who answered that description at the time when the will took effect, are entitled to the legacies of fifty dollars apiece. John R. died before the testator made his codicil, which ratified his former will in all respects not altered by the codicil itself; and the codicil takes no notice of the legacies to the two oldest children of Mr. Miles. A codicil is considered as a republication of a will; so that lands bought after the will, and before the codicil, pass by the will. *Barnes* v. *Crowe*, 1 Ves. jun. 498. The plaintiff was one of the two oldest children of Mr. Miles when the codicil was made, and when the testator died.

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In *Viner* v. *Francis*, 2 Bro. C. C. 658, a devise "to the children of my late sister A," was held to enure to two surviving children, although at the time when the will was made

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A had three children living. One of them died after the will was made and before the testator died.

But the case of *Lady Lincoln* v. *Pelham*, 10 Ves. 172, is more applicable. There the testator devised to the younger children of A. The second child having become the eldest, the only survivor was held entitled. The chancellor considering the persons as designated by age, and not by name, and that those should take who answered the description at the time of the testator's death, the second, who had become the oldest child, was excluded.

In the case at bar the plaintiff was one of the two oldest children of Mr. Miles when the codicil was made and when the testator died; and according to the sound construction of the will and codicil, we are satisfied it was the intention of the testator that the plaintiff should have the legacy in question.[1]

The defendant has made various objections to the right of the plaintiff to recover in this suit, notwithstanding his right to the legacy.

It is objected, that no demand was made for the payment of the legacy. It appears that there was no other demand than is contained in the letters which the defendant acknowledged he had received from Mr. Miles. It is evident that the defendant considered Mr. Miles's letter as a demand, for in his answer he says that he had been advised that it would be improper and unlawful for him to pay over the money, because the legacy had lapsed. It seems necessarily to be implied from the defendant's answers, that the plaintiff had requested him to pay, and the refusal is put altogether upon another ground.

But it is objected further for the defendant, that the plaintiff was not authorized to make the demand, and so it was merely void. If the defendant had originally made that ob-

[1] See *Lomax* v. *Holmden*, 1 Ves. sen. 290; *Emery* v. *England*, 3 Ves. 232, *Bowles* v. *Bowles*, 10 Ves. 177; Ram on Wills, 50 to 52, (in Law Libr. *No.* 24, *p.* 28 to 30); *Chadwick* v. *Doleman*, 2 Vern. 528; *Twynham* v. *Webb*, 2 Ves. sen. 198, 210; *Hall* v. *Hall*, Ambl. 203; *Broadmead* v. *Wood*, 1 Bro. C. C. 77, *Matthews* v. *Paul*, 3 Swanston, 334; *S. C.* 2 Wilson's Ch. R. 64; *Savage* v. *Carrall*, 1 Ball & Beat. 265.

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jection and had persisted in it, it would have been fatal to this action. For the father, as the natural guardian, has no authority to demand and receive a legacy to his child.[2] He

218 had never obtained any letters of guardianship. In Com. Dig. *Chancery*, 3 *G*, 6, it is said indeed, that payment to the father of an infant, where the legacy is not of value to support the charge of a decree, shall be good, though the father afterwards fails; and if it is a very small sum, the executor may pay it to the infant legatee, but not if it be a considerable sum. But such a rule is extremely uncertain. How much money will support the charge of a decree? what is a considerable, and what a small sum? To one man the amount in controversy would be very small, to another it would seem and be in truth very great. The rule could not, we think, be applied here at all, excepting in respect to sums obviously to be regarded as within the principle of *de minimis* &c., which would not extend to the legacy under consideration. In *Dagley* v. *Tolferry*, 1 P. Wms. 285, the testator gave £100 apiece to four infant children, and on his death-bed he said that his executor should pay the money to their father for the use of the infants; but the payment was held invalid.[1] In New York it is held that payment to the father as natural guardian is not allowable. *Genet* v. *Talmadge*, 1 Johns. Ch. R. 4. And that must be considered as the rule, in cases where there has not been a waiver of its application.

A demand by one having authority to receive and to discharge the legacy after it became payable, might have been insisted upon by the defendant. In the case of *Prescott, Judge &c.*, v. *Parker*, 14 Mass. R. 431, it was held that no action on a bond given for the faithful performance of the trust of executor, would lie in consequence of his not having paid

[2] *Hyde* v. *Stone*, 7 Wendell, 354; *Cunningham* v. *Harris*, cited in 3 Bro. C. C. 186; 2 Kent's Comm. (2d ed.) 219, 220; *Cooper* v. *Thornton*, 3 Bro. C. C. 186; 1 Eq. Ca. Abr. 300; Gilb. Eq. Ca. 103.

[1] See the remarks of Lord *Hardwicke* upon the case of *Dagley* v. *Tolferry* in *Phillips* v. *Paget*, 2 Atk. 80, in the course of which he says that "the rule laid down in that case is too strict, and that Lord *Cowper* seemed, even by the report of the case, to have had a remorse of judgment at the time, for, by examining in the Register's office, it appears that his lordship ordered the deposit to be divided between the parties."

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a legacy payable at a day certain, which had passed, but which legacy had not been demanded; the executor in such case not being in any fault. And the Court intimated an opinion, that the same rule would apply, if the legatee should sue for his legacy according to the provision of the statute. And we are now of that opinion. The executor is not obliged to seek the legatee, but may properly wait until the money is demanded.[2]

But it s a familiar principle that a party may waive his rights. "*Quilibet renunciare potest juri pro se introducto.*" If Mr. Miles had taken letters of guardianship and had sued as 219
guardian, without having made any demand, the defendant would not have been obliged to make any exception on that account. He might have waived that matter, and rested upon some other point of defence, or have consented to have judgment rendered against him. But this suit is by *prochein ami*, and not by guardian, and the authority of the *prochein ami* is only commensurate with the writ; and so it never could have been in the power of a *prochein ami* to have made a demand prior to his admission to prosecute.

At the common law, infants were required to sue and to defend by guardian. Co. Lit. 135 *b*, note 220. The law has not been altered as to the manner in which they are to defend But by the statute of *Westm.* 1, *c.* 48, infants were authorized to sue by *prochein ami* in an assise, and by *Westm.* 2, *c.* 15, in all other actions. "*In omni casu quo minores infra ætatem implacitare possunt, concessum est &c., quod propinquiores amici admittantur ad sequendum pro eis.*" It was a cumulative remedy, leaving it optional for them to sue either by guardian or by next friend. *Young* v. *Young*, Cro. Car. 86; *Goodwin* v. *Moore*, ibid. 161. But whether the suit be by one or the other, he must be admitted by the court. If the suit be by guardian, it is not now necessary that there should be any other record of admission than the recital of the fact in the count; — "*J. R. per A. B. gardianum suum ad hoc per curiam specialiter admissus, queritur &c.*" *Rawlyn's case, in Error*, 4 Co. 53. It was formerly held that the defendant was not compellable to answer until the plaintiff showed a rule

[2] See *Chapin* v. *Hastings*, 2 Pick. (2d ed.) 362, note 1.

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Miles v. Boyden.

of court for his admittance; Com. Dig. *Pleader*, 2 *C*, 1; but the rule now is, that the *prochein ami*, as well as the guardian, is to be admitted by the court without any other record than a recital in the count.[1] *Archer* v. *Frowde*, 1 Str. 304. It must follow therefore, that the *prochein ami*, commencing his authority with the writ and declaration, can only maintain the suit for such causes of action as may be prosecuted without special demand; as for personal injuries done to the infant, or for sums of money where the writ itself is considered as the demand. So that this objection would be fatal to the action, unless the defendant may be considered as having waived the necessity of any special demand.

220 And upon reviewing the letters of the defendant to the plaintiff, we are satisfied that he has waived all objections to the plaintiff's right to recover, excepting only as to the construction of the will, *viz.* whether the testator intended that the infant for whom the plaintiff sues, should have the legacy as he claimed, or whether it was lapsed by the death of his brother John, as the defendant contended. In the defendant's letter of December 16, 1822, after observing that his counsel had informed him, that "another child could not take the place of that which was one of the oldest when the will was made," he says, "if this is not a correct opinion, the money is at your service, and shall be paid to you without any further trouble on your part. My only object is to do the business as the law directs. It is equal to me:" — giving the plaintiff to understand, that he had no other desire than to have the correctness of that opinion ascertained by a legal adjudication. And in the defendant's letter of the 28th February, 1823, the same point of controversy is stated. He says that he has been informed without hesitation that the legacy had lapsed. He made no other point or question. He did not call for a more formal or legal demand of payment. The plaintiff, lulled by these suggestions, took the mode that would be least expensive

[1] *Judson* v. *Blanchard*, 3 Connect. R. 579; *Apthorp* v. *Backus*, Kirby, 407; *Stewart* v. *Crabbin's Guardian*, 6 Munf. 280. In New York, by the Revised Statutes, (2 Rev. Stat. 446, § 2,) the appointment of a next friend is required before any process is issued in the name of an infant. *Wilder* v. *Ember*, 12 Wendell, 191.

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and troublesome, to obtain a legal decision of the only point in controversy. He purchased a writ and therein was legally admitted to sue for the infant. It is not fair or allowable, after a decision has been given against him upon the main, indeed upon the only question, to raise incidental and strict technical objections which would have been avoided, if the plaintiff had not been induced by the defendant to believe they would not be made. The plaintiff having been admitted by the Court to prosecute for the infant, may discharge this judgment, and it will bar any future action for the legacy.

For these reasons the Court is of opinion, that the defendant should be defaulted; and judgment is to be for the plaintiff for the amount of the legacy, with interest from the date of the writ. No interest is to be charged before that time, because the plaintiff was not authorized, before he was admitted to prosecute, to give a discharge that would be binding upon the 221 infant, and if the defendant had paid it before suit he would have been entitled to have a bond of indemnity.[1]

CALVIN SMITH *versus* CHARLES PUTNAM *et al.*

A lessee for years of a farm covenanted not to "carry off any hay or stover of said farm, under forfeiture of ten dollars for each ton." A quantity of hay was attached on mesne process by his creditors and carried off against his consent. *Held*, that this was not a breach of the covenant.

THIS was an action of *covenant*, which came before the Court on a case stated.

On the 4th of March, 1824, the parties entered into an indenture, by which Smith leased to the defendants, for three years, two thirds of a farm, and it was covenanted that they should "not carry off any hay or *stover* of said farm, under forfeiture of ten dollars for each ton." While the defendants were in possession under the lease several tons of hay were attached upon writs sued out by creditors of the defendants, and were removed from the farm and sold, and the proceeds

[1] See *Daggett, Petitioner, post*, 280.

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Smith v. Putnam.

were afterwards applied in part satisfaction of the judgments recovered by the creditors. Putnam forbade the officer to carry off the hay, as there was a condition in the lease that it was not to be carried off the farm.

Oct. 7th.

Washburn, for the plaintiff, cited *Doe* v. *Hawke*, 2 East, 481.

J. Davis and *Allen*, for the defendants, cited *Crusoe* v. *Bugby*, 2 W. Bl. 767, and 3 Wils. 234, and the cases here after commented on by the Court.

The opinion of the Court was read as drawn up by

April term 1826.

PARKER C. J. The covenant declared on is, that the defendants, who had hired the plaintiff's farm by indenture of lease, should "not carry off any hay or stover from said farm, under the forfeiture of ten dollars for each ton;" and the breach alleged is, that "they did carry off from said premises a large quantity, to wit, ten tons of hay, contrary," &c. By the statement of facts agreed on by the parties it appears, that

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during the continuance of the lease, certain creditors of the defendants attached a quantity of hay, which had been cut on the farm, and caused the same to be removed therefrom; and that it was afterwards sold to satisfy the judgments recovered by those creditors; and the question is, whether this is a removal within the terms of the covenant. It does not appear that the defendants procured or assented to these attachments; but on the contrary it is agreed that Putnam, one of the defendants, forbade the hay's being carried off, stating that by the provisions of his lease it was to be expended on the farm. The words of the covenant, taken strictly, will reach only a voluntary removal of hay, &c., by the defendants;—"they shall not carry off," &c. If it had been provided in addition to this, that they should not "suffer to be carried off," perhaps an involuntary removal would have been a breach.[1] But the law in England seems to be very clear, that in analogous covenants, such as not to assign, set over, put away, &c., a transfer upon execution or a judgment not assented to for the purpose of authorizing the sale, is not a breach of such condi-

[1] But see *Hobson* v. *Middleton*, 9 Dowl. & Ryl. 247; *S C.* 6 Barn. & Cresw. 295; *Hesse* v. *Albert*, 3 Mann. & Ryl. 406.

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tions. It was so settled in the case of *Doe dem. Mitchinson* v. *Carter*, 8 T. R. 57, notwithstanding the execution, on which the lease was sold, issued on a judgment rendered on a confession by warrant of attorney, which original act was voluntary on the part of the lessee. The same case having come up again before the court, as reported in the same volume, *p.* 300, judgment was rendered for the plaintiff, on the ground that the lessee had confessed judgment for the express purpose of enabling the creditor to take the lease in execution. This was treated as a fraud upon the lessor, and the title under the execution was vacated. In this latter case Lord *Kenyon* says, "If the lease had been taken by the creditor under an adverse judgment, the tenant not consenting, it would not have been a forfeiture."[2]

The case in 2 East, 481, does not militate against the foregoing decision; for the estate was considered to have been leased on the condition that the lessee should continue to dwell thereon, and his actual removal, though immediately before a sale of the premises on an execution, was determined 223
to be a forfeiture.

The English common law on this subject has been recognised and adopted in New York. The case of *Jackson dem. Schuyler*, 7 Johns. R. 531, is exactly similar to the case cited from 8 T. R. 57. The court say, that the covenant not to assign &c., only applies to voluntary sales by the lessee. And in the case of *Jackson dem. Stevens et al.* v. *Silvernail*, 15 Johns. R. 278, which was the case of a lease for life, with covenant not to sell, dispose of, or assign his estate in the premises, the lessee voluntarily executed a lease of part of the

[2] On the distinction, which governed the judgment in *Doe* v. *Carter*, 8 T. R. 57, it has been holden that the bankruptcy of the lessee, and consequent vesting of his term in the assignees under the commission, are not a breach of a covenant restraining assignment, the word *assigns* being construed by the court to mean voluntary assigns. *Doe* v. *Bevan*, 3 Maule & Selw. 353; *Doe* v. *Smith*, 5 Taunt. R. 795; *S. C.* 1 Marshall, 359; *Onslow* v. *Corrie*, 2 Madd. R. 341; *Goring* v. *Warner*, 2 Eq. Cas. Abr. 100, pl. 3; *S. C.* 7 Vin. Abr. 85, *pl.* 9.

See also *Doe* v. *Watt*, 8 Barn. & Cresw. 308; *S. C.* 8 Dowl. & Ryl. 35; *Shee* v. *Hale*, 13 Ves. 404; *Wilkinson* v. *Wilkinson*, 3 Swanston, 515; *Rex* v. *Topping*, 1 M'Clel. & Young, 544.

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premises for twenty years; and this was held no breach. The court say, — "The plaintiff's claim is *stricti juris*; and to entitle him to recover &c., he must bring his case within the penalty, on the most literal and rigid interpretation of the covenant."[1]

Now we think there can be seen no difference in principle between these cases and the case at bar. It has been suggested, that in the cases decided in England and New York the covenants were construed with greater strictness, because a forfeiture of the estate was occasioned by a breach; but we can hardly think a different rule of construction would be applied to cases of penalty, or stipulated damages, and cases of forfeiture. And indeed, in one of the cases above cited, it is argued by counsel, that the forfeiture ought not to be adjudged, because if an action had been brought for a penalty in like circumstances, it could not be maintained. 8 T. R. 57.

The general principle to be deduced from the cases is, that covenants not to assign, transfer, &c., are broken only by a voluntary transfer by the lessee; that sales on execution, the judgment being *in invitum*, are no breach; though if suffered for the purpose of evading the force of the covenants they shall be considered a breach. In the case before us there was no consent of the lessees, express or implied; we are brought therefore to consider, that the removal of the hay was involuntary and therefore no breach of the covenant.[2]

Plaintiff nonsuit.

[1] See Platt on Covenants, 406 *et seq.* (in Law Libr. *No.* 8, *p.* 181, *et seq.*)

[2] See *Elliot* v. *Edwards*, 3 Bos. & Pul. 181; *Rex* v. *Topping*, 1 M'Clel. & Young, 544.

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COMMONWEALTH *versus* The Heirs of ANDRÉ and BILLON.

The legislature of the commonwealth, for a valuable consideration, granted land to an alien, his heirs and assigns, with warranty. *Held*, that upon the death of the grantee the land descended to his heirs, who also were aliens, and that upon an inquest of office the commonwealth were estopped to set up the alienage of the grantee or of his heirs as the ground of an escheat.

ON the 25th of May, 1781, a committee of the legislature, thereunto duly authorized, by their deed duly executed, for the consideration of £1124, granted to Pierre Mathieu André, his heirs and assigns, with warranty, a tract of land in the town of Holden, which had been confiscated as estate of William Brattle. André was at that time resident in Boston, but was a subject of the king of France and alien to the commonwealth, and was never naturalized therein. The purchase was made for the benefit of Jean François Billon, likewise a subject of the king of France, and resident at Marseilles. André and Billon both died in 1810, intestate.

In February 1820, the attorney-general, pursuant to a resolve of the legislature of the 31st of January preceding, filed an information to recover seisin and possession of the land in question, alleging that it ought to escheat to the commonwealth for defect of title in any person who could by law hold the same.

The children of André, being his heirs and subjects of the king of France, and the children of Billon, being his heirs and subjects of the same king, appeared and answered to the information, alleging respectively that the title to the land had descended to them.

The cause was argued in writing.

Morton (Attorney-General) and *Davis* (Solicitor-General) for the commonwealth, cited 1 Bl. Com. 372, 374; 2 Bl. Com. 274, 293, 249; Co. Lit. 2, 8; *Sheaffe* v. *O'Neil*, 1 Mass. R. 257; *Fox* v. *Southack*, 12 Mass. R. 148; and they contended that although under the 7th article of the treaty with France of July 31st, 1801, (U. S. Laws, edit. 1815, *vol.* 1, *p.* 119,) an alien might sell his land to a citizen, yet that it could not descend to his alien heirs.

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Common wealth v. The Heirs of André and Billon.

W. Sullivan and *W. P. Mason*, *contrà*, relied upon the treaty above mentioned, and likewise on the treaty of amity and commerce with France of February 1778, *Art.* 11, (U. S. Laws, *vol.* 1, *p.* 80,) the abrogation of which in 1798, (U. S. Laws, 5 *Cong.* 2 *Sess. c.* 84,) they said, did not make void rights which had been acquired under it. *Ainslie* v. *Martin*, 9 Mass. R. 460; *Fox* v. *Southack*, 12 Mass. R. 143; *Chirac* v. *Chirac*, 2 Wheat. 277. They further contended, that the commonwealth by this process could not avoid its own grant.

April term 1826.

The opinion of the Court was read as drawn up by

PARKER C. J. It having been determined by the verdict of the jury, that the persons claiming to be the heirs of Pierre Matthieu André, and those claiming to be the heirs of Jean François Billon, are such, according to the laws of descent in France and in this country, the only question is, whether on account of their alienage, or that of their several fathers, they are prevented from inheriting the land which was purchased by André of the commonwealth, which prosecutes this suit. Without undertaking to decide what would be the effect of the alienage of these heirs under the several treaties which have been cited, we decide the cause upon the ground that the commonwealth, having conveyed the land to André, then a French subject, and received the full consideration therefor, cannot reclaim the land from him or his heirs for the cause of alienage in him or them. The deed was made by a committee fully authorized thereto by a resolve of the legislature, and by the deed the commonwealth has covenanted to warrant and defend André, his heirs and assigns, against the lawful claims of all persons whatsoever. This deed must operate as a rebutter, as it would if an individual were the grantor; and with more reason, because the commonwealth is not liable to an action. The commonwealth, if the land were recovered, would feel itself bound to repay the consideration money, with interest. This would be a claim which could not be resisted without degrading the country. But there is no need of resorting to this remedy; for the deed of the commonwealth to the very persons now defending as heirs to André, to whom and to whose heirs the grant was

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made, is, we think, an estoppel against setting up the alienage of those persons as the ground of recovery.[1]

The judgment of the Court therefore is, that the commonwealth take nothing by their inquest.

Common wealth v. The Heirs of André and Billon.

CHARLES A. HAMILTON *versus* JOHN D. SHEPHERD.

The appointment of a member of a volunteer company in the militia to be an engine-man, exempts him from militia duty, but does not discharge him from his enlistment, and if he ceases to be an engine-man before the expiration of the term of the enlistment, his liability to do duty in such company revives. And this liability will not be affected by his enlisting, while so exempted, in another volunteer company and receiving a non-commissioned officer's warrant therein. [See Revised Stat. *c.* 12, § 2.]

UPON a complaint before Austin Denny, a justice of the peace, by Hamilton, as clerk of a volunteer company of light infantry, against Shepherd, for neglecting to perform military duty in that company on the first Tuesday of May 1825, it appeared that Shepherd was enlisted into that company in 1820, that he was afterwards appointed an engine-man, and that he duly exhibited the certificate of such appointment to entitle him to exemption from military duty; that while he was an engine-man and so exempt, he was enlisted into a volunteer rifle company, and was thereupon by the captain of that company appointed a corporal, and that he received a warrant accordingly from the commanding officer of the regiment, and that he is still a corporal in that company; but it did not appear that such captain or commanding officer knew of his enlistment in the light infantry company. It was agreed that for more than a year next preceding the third Tuesday of May 1825, he had not been an engine-man. The justice determined that he was not guilty of neglect of duty, and Hamilton now petitioned this Court for a writ of *certiorari*.

[1] See per *Story* J., *Carver* v. *Jackson*, 4 Peters's Sup. C. R. 87; *Penrose* v. *Griffith*, 4 Binn. 231; *Garwood* v. *Dennis*, 4 Binn. 314; *Commonwealth* v. *Pejepscot Proprietors*, 10 Mass. R. 155; Stearns on Real Actions, (2d ed.) 179; *Garrish* v. *Bearce*, 11 Mass. R. (Rand's ed.) 200, note *a*.

If an alien purchases with the King's license, it seems that he may hold effectually. See 14 *Hen.* 4, 20; Hargr. Co Litt. 2 *b*, note 2.

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Hamilton v. Shepherd.

The case was argued in writing, in vacation.

Burnside, for the petitioner, referred to *St.* 1809, *c.* 108, § 34, *art.* 14, which provides that a person who enlists in a volunteer company shall be held to do duty therein for the
227 term of seven years, unless sooner discharged by order of the commanding officer of the brigade; and he contended that the appointment of the respondent to be an engine-man *excused* him from military duty so long as he continued an engine-man, but did not *discharge* him from the company of light infantry; *Commonwealth* v. *Smith*, 14 Mass. R. 374; *Commonwealth* v. *Thaxter*, 11 Mass. R. 386; and that his enlistment in the rifle company could not interfere with his prior obligations to the other company.

J. Davis and *Allen*, *contrà*. From the case of *Commonwealth* v. *Smith* it may be inferred that the respondent, after becoming an engine-man, was no longer a member of the light infantry company for any purpose whatsoever. He was not liable to do military duty, nor to be drafted, nor could he be considered as on the roll for the purpose of preventing the company from being disbanded under § 16 of *St.* 1809, *c.* 108. If his contract of enlistment was not dissolved, then is every member of a volunteer company, who is appointed to some office, no matter how elevated, which exempts him from military duty, liable to be called upon, whenever such exemption ceases, to return to the ranks and complete his seven years; for during the exemption he cannot be considered as a member so as to have the term of enlistment go on. But whether the respondent was discharged or not by becoming an engine-man, still, having enlisted in another company while exempt, and having received a non-commissioned officer's warrant, he has a right to the benefit of his promotion, according to the case of *Commonwealth* v. *Thaxter*.

April term 1823.

The opinion of the Court was read, as drawn up by

PARKER C. J. We think the magistrate erred in supposing that the respondent's enlistment in the rifle company, and his appointment to the duty of corporal therein, while exempted from militia duty on account of being an engine-man, excused him from service in the infantry company in which he had previously enlisted. The exemption of an engine-man may

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be temporary or permanent, at the option of the person undertaking that duty. So long as he shall continue attached to an engine, and shall produce *annually* his certificate thereof to the captain of the company, he is to be exempt from militia duty, or if he does not so produce it, excused, the difference being only that upon the production of his certificate he need not be notified to appear at the several trainings during the year; but if he ceases to be an engine-man, or fails to produce his certificate, he not being struck off the roll is liable to be notified, like other privates, he still belonging in fact to that corps of the militia to which he was before attached, his temporary exemption not operating as a discharge. If he belonged to no volunteer company, he would of course fall into his place in the standing company of militia in which he was enrolled; and if he belonged to such volunteer company, his liability to do duty in it, which had only been suspended, is revived.

We think also that the respondent's second voluntary enlistment into another volunteer company does not relieve him from his liabilities to the first. He had engaged himself for seven years; had a dispensation for such time as he should continue an engine-man; but had not a right to transfer his services to another company to the prejudice of that in which he had first enlisted.

Nor will his appointment as corporal in the rifle company make any difference; for the captain of one company cannot take men from the ranks of another and make of them non-commissioned officers. It is not like the case of *Commonwealth* v. *Thaxter*, which has been cited, for the commandant of the regiment in that case advanced Thaxter from the ranks of the volunteer company which was a component part of his regiment, which he had a right to do.

Proceedings quashed

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Isaac Smith *versus* Sardis Spooner.

The *St.* 1818, *c.* 60, which, in case a guardian shall be appointed to a spendthrift, avoids "every gift, bargain, sale or transfer of any real or personal estate," made by the spendthrift after the complaint of the selectmen to the judge of probate and the order of notice thereon shall have been filed in the registry of deeds, does not apply to promissory notes. [But see Revised Stat. *c.* 79, § 13.]

This was an action of *assumpsit* upon a promissory note given by Spooner to the plaintiff, dated October 4, 1822, for 39 dollars. The defendant, by J. W. Jenkins his guardian, pleaded the general issue.

On the trial in the Court of Common Pleas, before *Strong* J., it was shown, that on the 20th of August 1822, a complaint was made by the selectmen of Barre, to which town Spooner belonged, to the judge of probate, requesting a guardian to be appointed over Spooner, on account of his intemperance, idleness and wasting of property; that the judge decreed that an order of notice should issue to Spooner to appear on the 3d Tuesday of October following, to show cause why a guardian should not be appointed, which order was served on the 27th of September; that on the 3d Tuesday of October the judge decreed that Spooner should be put under guardianship, and on the 7th of January 1823, appointed Jenkins his guardian; and that before the date of the note the selectmen of Barre filed a copy of their complaint, and of the order of notice thereon, in the office of the register of deeds. It further appeared that the note was made for a valuable consideration.

The jury were instructed that the statute of 1818, *c.* 60, did not apply to this case; whereupon the defendant filed his exceptions.

The statute referred to provides, that in case a guardian shall be appointed to a person complained against as above, "every gift, bargain, sale or transfer of any real or personal estate," made by such person after the filing of a copy of the complaint, and of the judge of probate's order of notice thereon, with the register of deeds, shall be void.

The case was argued in writing, in vacation.

Houghton and *Shepley* in support of the exceptions. The

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St. 1818, *c.* 60, is in addition to *St.* 1783, *c.* 38, and both are to be considered as one statute. In construing a statute it is proper to consider the object and intention of the legislature in making it. *Holbrook* v. *Holbrook et al.* 1 Pick. 258; *Gibson* v. *Jenney*, 15 Mass. R. 205. The words of a statute may be enlarged or restrained according to the true intent of the makers of the law. *Whitney* v. *Whitney*, 14 Mass. R. 92. Making the complaint to the judge of probate, and filing the copy of the complaint and order, if a guardian is afterwards appointed, are by the additional act made equivalent to the actual appointment of a guardian under *St.* 1783, *c.* 38. By a comparison it will be found, that the words of the additional act are as strong as those of the 7th section of the other, and unless the contract declared on is voidable, a similar one made by a spendthrift under guardianship will be good. If this action can be maintained, the holder of such a note, by resorting to legal measures, will necessarily effect a transfer of the spendthrift's estate, and the statutes may as well be repealed.

Lee, for the plaintiff, cited in regard to the construction of statutes, *Melody* v. *Reab*, 4 Mass. R. 473; *Gibson* v. *Jenney*, 15 Mass. R. 205; 7 Mass. R. 524; *Pearce* v. *Atwood*, 13 Mass. R. 343.

The opinion of the Court was read as drawn up by *April* 1826

PARKER C. J. We think it very clear, that the decision of the Court of Common Pleas in regard to the operation of *St.* 1818, *c.* 60, was correct.

Every man of full age and sound mind is at liberty to make contracts, and if made upon good consideration and without fraud, he must be bound by them, unless by statute provision he is disabled. And disabling statutes of that nature should be construed strictly, for though founded in policy and a just regard to the public welfare, they are in derogation of private rights.[1]

The statute makes void all and every gift, bargain, sale or transfer of any real or personal estate, made after the filing of a copy of the complaint &c. against one as a spendthrift with the register of deeds. The promissory note declared on is not

[1] *Ash* v. *Abdy*, 3 Swanston, 664.

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Smith v. Spooner.

within the words certainly, and we think not within the spirit of that provision.

It is true that by means of a note or other contract made on the eve of a disability to contract, the real and personal estate of the party may be indirectly affected, but the mischief was not sufficiently obvious to induce the legislature to extend their protection thus far. Nor was there the same reason for avoiding these contracts, as for avoiding gifts &c. of real or personal estate; for if the note shall be given without consideration, it may be avoided; if with consideration, the spendthrift has received his equivalent; whereas in the case of gifts, &c., they might be good without consideration, if made without fraud. No argument can be drawn in favor of the defendant from the difference of the two statutes. The subject matter is the same in both; the latter statute merely anticipates the period when the acts shall become void. We ought not to proceed faster than the legislature on this subject; if the public interest requires that all debts contracted shall be avoided, it will be so enacted.[1]

Judgment affirmed.

[1] But see *Manson* v. *Felton*, 13 Pick. 206, where the doctrines of the case of *Smith* v. *Spooner* are somewhat restrained. It is there held, that a spendthrift under guardianship is not competent to make a valid contract for the payment of money. See also Revised Stat. c. 79, § 13.

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The Inhabitants of the First Parish in Sutton *versus* Hannah Cole.

A mistake in the name or description of a devisee will not make void the devise where the intention of the testator is clear; as where the devisees were called by their popular name, *The South Parish in S*, their legal name being *The First Parish in S.*

It seems that corporations created for specific objects have no power to take and hold real estate for purposes wholly foreign to those objects.

A parish, as well as a town, is capable of taking and holding a devise to be applied to the use of schools.

Where the record of a parish meeting shows it to have been called by the warrant of a justice of the peace, under *St.* 1786, *c.* 10, § 2, [Revised Stat. *c.* 20, § 17,] and to have been regularly warned, no exception to the authority of the magistrate appearing on the record, neither a stranger, nor, *it seems*, an inhabitant of the parish, will be allowed to question the legality of the meeting, on the ground that the application to the magistrate was signed by fewer than ten persons, or that some of the signers were not qualified voters. But *it seems* that such irregularities, if excepted to by the inhabitants at the meeting, would render the proceedings of the meeting void.

So if persons who are not qualified voters, do in fact vote at a parish meeting without being challenged, no one can take advantage of such irregularity to vacate the proceedings.

So a parish meeting called by persons acting as a committee of the parish, under color of a regular appointment, will be held legal, if no exception to their authority is taken at the meeting.

A vote of a parish "to take measures to obtain possession" of a devise, and another, "to choose agents to institute or defend any suit or suits, and act any thing relative thereto," will authorize the agents to make an entry on the land devised, previously to bringing a writ of entry.

Where two agents are appointed by a parish to make an entry on land, an entry by one alone does not pursue the authority; but the parish may avail themselves of such entry by bringing their action upon it, which will be a ratification.

Where a writ of entry was brought in the name of a parish, which had had no meeting for more than nine years before the commencement of the action, but the defendant pleaded to the merits, without contesting the authority of the attorney of the demandants, the action was sustained.

This was a writ of entry, in which the demandants counted upon their own seisin within thirty years and a disseisin by the tenant. Trial was had before *Putnam* J. upon the general issue.

It appeared that John Cole, by his last will, dated in February 1807, and proved in July following, devised the land in question, "to the South Parish of Sutton, to be applied for the use of schools, and to be kept by the inhabitants for ever."

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The South Parish, and the First Parish in Sutton, mean the same parish.

To prove an entry under the devise, the demandants offered in evidence a book purporting to be the records of the South Parish, in which were entered a vote of that parish at a meeting on the 2d of March, 1808, "to choose a committee, to consist of three persons, to manage the prudential affa'rs of said society," and the choice of three persons as such committee.

A warrant was issued by this committee on the 11th of April, 1808, for a meeting of the inhabitants of the parish on the 2d of May following, and at a meeting held accordingly, these votes were passed. "Voted, that the parish will take measures to obtain possession of the donation of the late Mr. John Cole. Voted, that the parish will choose an agent or agents to institute or defend any suit or suits that may be commenced for or against them, and act any thing relative thereto Voted, to choose two agents. Chose Estes Howe Esq. and Lieut. Amasa Roberts, agents."

The tenant objected to these records as evidence, on the ground that the meetings above mentioned were irregular and illegal, and all the proceedings at them void. In support of the objection, he gave in evidence the act of October 28, 1743, incorporating The North Parish in Sutton, and the act of June 25, 1794, incorporating The First Congregational Society in Sutton; and offered to prove, that from the time of the incorporation of that society, until the 2d of March, 1808, the South Parish had not been in an organized state; that the meeting held on that day was called by a warrant issued by a justice of the peace, upon an application of fewer than ten inhabitants of the parish; and that members of the Congregationa society voted, both at that meeting and at the meeting held on the 2d of May, indiscriminately with the inhabitants of the parish; and that the records of the parish begin in 1808 and terminate in 1813.

The tenant insisted that these facts, if proved, would show that the parish had not accepted of the devise, and had no entered on the demanded premises so as to maintain this action But with a view to try the merits of the case, the judge ruled

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that the records were sufficient to prove that Howe and Roberts were authorized to enter and claim for the demandants, and that evidence of the facts which the tenant offered to prove was inadmissible.

The demandants then called Roberts, who testified that in 1808, after the vote by which he was chosen an agent, he entered upon the demanded premises and claimed possession for the parish, which the tenant refused to yield

A verdict was returned for the demandants.

The cause was argued in writing by *L. Lincoln*, before his appointment as a justice of this Court, for the tenant, and *E H. Mills* and *Ashmun* for the demandants.

Argument for the tenant. Parishes in this commonwealth are created by statute for religious purposes exclusively; they have no powers except those given them by statute, and those extend only to the settlement of ministers, building houses of public worship, and the charges arising from and necessarily connected with these objects. *Bangs* v. *Snow*, 1 Mass. R. 190. A corporation of this description cannot act as trustee of a school fund, for this would be inconsistent with the end for which the corporation is created. In England, devises of land to charitable uses were prohibited by 9 *Geo.* 2, *c.* 36, as being within the mischief attempted to be remedied by the statutes of mortmain, and in this commonwealth, wherever an authority to receive such donations has been intended, it has been explicitly granted. See *St.* 1785, *c.* 51, and various acts incorporating literary and other institutions; *Phillips Academy* v. *King*, 12 Mass. R. 546. However it might be urged, that a town, in its municipal character, as a corporation bound by law to provide for the instruction of children, may take a devise in trust, for the use of schools, yet unless in its parochial capacity it can accept and discharge a trust to its own use as a municipal corporation, which will not be pretended, it will follow that a parish, which has succeeded, by the operation of law, to no other than the parochial powers of a town, cannot take a devise in trust for the use of schools. This case does not come within the principles applicable to eleemosynary corporations.

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From these remarks it results, that the devise to the demandants was void.

But however this may be, the action cannot be sustained, because the demandants were never seised. They have neither accepted the devise, nor made an entry upon the land. *Wells* v. *Prince*, 4 Mass. R. 64; *Brown* v. *Wood*, 17 Mass. R. 68; *Fuller* v. *Fuller*, Cro. Eliz. 422; *Wells* v. *Prince*, 9 Mass. R. 508; *Dally* v. *King*, 1 H. Bl. 1; Co. Lit. 240 *b*. Such an acceptance and entry could only be made by or in pursuance of some corporate act. *Monumoi* v. *Rogers*, 1 Mass. R. 162; *Andover &c. Turnp. Corp.* v. *Hay*, 7 Mass. R. 107; *Essex Turnp. Corp.* v. *Collins*, 8 Mass. R. 298; *Hayden* v. *Middlesex Turnp. Corp.* 10 Mass. R. 402. Here all the proceedings of the demandants in relation to the devise were illegal and void. The *St.* 1786, *c.* 10, § 2, provides that in certain cases a justice of the peace "upon the application of *ten* or more of the *voters* in the parish or precinct, may call a meeting." The tenant has a right to assume, that the meeting of the 2d of March 1808, was called upon the application of fewer than ten persons, and that some of those who applied were not voters; provided it were competent to her to prove these facts. That such proof was admissible is plain from various cases in our reports; more especially those relating to the assessment of taxes, and from cases of contested elections, in which the regularity with which similar meetings have been called, has been made a subject of investigation. To preclude an inquiry into the number and qualifications of the persons applying for a warrant, would render the statute provision nugatory. The first meeting in March 1808, being shown to be illegal, the election of the prudential committee was void, and of course the subsequent meetings, all of which were called by this prudential committee, were illegal and their proceedings void. Another objection to all the proceedings relating to this devise, is the fact, which the tenant may consider as proved, namely, that the members of the First Congregational Society voted on the subject. By the statute of June 25, 1794, they ceased to be members of either the North or the South parish; as is expressly adjudged in *First Parish in Sutton* v. *Cole*, 8 Mass.

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R. 96. They may have been so numerous as with a minority of the qualified voters to have constituted the majority, and their interference was utterly inadmissible. *Cragie* v. *Mellen*, 6 Mass. R. 17.

Upon the foregoing view of the case, the entry of Roberts is immaterial, since his appointment as agent was void. But even if the meetings had been legal, still there was no entry under the authority of the demandants; 1. because the votes of the parish did not direct such entry to be made, nor were agents appointed for that purpose; 2. because whatever authority was given, was delegated to two persons jointly, and the entry was made by one alone.

The argument on the part of the *demandants* will appear sufficiently in the opinion of the Court. To show that they had a capacity to take the devise, both by common law and by statute, were cited 4 Cruise's Dig. *tit.* 32, *Deed*, *c.* 2, § 32; and *St.* 1789, *c.* 19, § 8, which enacts that parishes may vote and raise money for the support of "a schoolmaster to teach their children," &c.; — to the point that the regularity of the meetings could not be called in question, *Thayer* v. *Stearns*, 1 Pick. 113; — and to the point that the demandants might avail themselves of the entry made in their behalf by Roberts, even if he had been a stranger, the bringing of the action being a ratification of his act, Phillips on Ins. 519 (cites 13 East, 274 — 4 Mass. R. 232 — 2 Caines's R. 284 — 1 Caines's R. 303); Plowd. 8 *b*; Co. Lit. 245 *a*, 258 *a*; *Herring* v. *Polley*, 8 Mass. R. 119; *Pratt* v. *Putnam*, 13 Mass. R. 361.

In *reply*, it was said that the *St.* 1789, *c.* 19, confers no power on a parish to manage a corporate fund, or to take property in trust, for the support of schools. Such a power would be repugnant to the general character and objects of parish corporations. The bringing of the action is ineffectual as evidence of a ratification of the entry, for it is not pretended that there was any other authority to commence it than the vote under which the entry was made, and which has been shown to be void.

The opinion of the Court was read as drawn up by

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PARKER C. J. The legal existence of the demandants as

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a corporation by the name under which they have sued, does not appear to be denied, and no objection has been made, in the course of the able argument by the counsel for the tenant, to the denomination of the parish in the devise, though no parish existed with the legal name therein given. The authorities are all clear and consistent, to show that the intention of the testator in a devise or bequest will not be frustrated by a mistake in the name or description of the object of his bounty. Thus a devise to a college by a name which it bears in common parlance, though not the true corporate name, is good. *Case of Chancellor &c. of Oxford*, 10 Co. 57; *Counden* v. *Clerke*, Hob. 32. So a devise to the Mayor, Chamberlain and Governors is valid to a corporation whose true name is Mayor, Citizens and Commonalty. Owen, 35. So to the Master and Wardens of the Mystery of Cordwainers, incorporated by the name of Warden, Masters and Commonalty. *Foster* v. *Walter*, Cro. Eliz. 106. So a devise to Edward Williamson was held good to Edward Anderson. Godb. 17. These cases are sufficient to show that the devise in question to the Inhabitants of the South Parish, may be enjoyed by the Inhabitants of the First Parish, it being agreed that they are the same corporation.[1]

We come then to the only two questions which the case seems to admit of, in respect to which the written arguments of counsel have furnished us with all the light necessary to a decision.

It is objected first, that a parish is not such a corporation as can take a devise for the purposes intended by the testator to be secured by his gift. And the argument is, that parishes are corporations with limited powers relating only to parochial objects, such as providing for public worship, and have no authority to hold property for themselves or other persons to any other trust or purpose, or at least not for maintaining schools, which is not a duty required of them by law, so that this devise, having for its object what cannot be legally effected by

[1] *Inhabitants* v. *String*, 5 Halsted, 323; *Dauphin Turnp. Co.* v. *Myers*, 6 Serg. & Rawle, 12; *Porter* v. *Neckervis*, 4 Randolph, 359; 1 Kyd on Corp 236 to 252; *Road Co.* v. *Creeger*, 5 Harr. & Johns. 122; *African Society* v *Varick*, 13 Johns. R. 38; *Woodwick* v. *Forest*, Pennington, 115

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a parish, is void, and the heir at law is to inherit the estate devised. First Parish in Sutton v Cole

The argument does not require a decision of the general question, whether by the common law corporations may be seised in trust for the benefit of any other person, but seems to rest principally upon the nature of this particular corporation in relation to such a trust as is attempted to be created by this will; for it seems to be admitted, that if parishes were under legal obligation to maintain schools, as towns are, they might, as well as towns, receive donations in trust for that purpose. And indeed no reasonable distinction can be suggested between these two corporations, in relation to their powers in this particular, other than that which grows out of the different character of the two in this respect. Our towns are all liable by law to support schools, and are vested with power to assess the property of the inhabitants therefor. Parishes are under no such obligation, and therefore it may be well that the former may receive and hold property devised to them in ease of this burden, and that the latter may not. But we think legal liability alone does not settle the question; for if a parish may legally establish and maintain schools within their parochial jurisdiction, and may raise taxes upon the inhabitants therefor, although not required so to do under a penalty for neglect, as towns are, they may nevertheless receive donations in aid of that cause, and may with such donations and such taxes as may be necessary, establish such schools as to the inhabitants of the parish may seem proper. In such cases the gift or devise is not strictly in trust, for no other body or person is to receive the benefit. There seems to be no reason why such corporations may not be the objects of public or private bounty. Donations to them stand upon the same footing as donations to religious corporations to aid them in building and keeping in repair meeting-houses, supporting a minister, &c., and there are too many funds of this nature throughout the commonwealth to make it safe or proper to call in question their power to hold; indeed the legislature have by many public and private acts recognised the power of towns, parishes and religious societies to take and hold property for such purposes. The circumstances of the country not having been thought to require any 238

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restraint upon the holding of property by such bodies, as in England, where the statutes of mortmain were necessary to prevent the whole property of the kingdom from being swallowed up in monasteries.

If a devise or legacy to the inhabitants of a town to be applied to the purpose of maintaining schools be valid, of which we think there is no question, then a similar devise to a parish, if vested with power to carry into effect the views of the donor, must likewise be valid. And by *St.* 1789, *c.* 19, § 8, it is expressly enacted, that all parishes may vote and raise money for the support of schools for their children.

If it be thought strange that the legislature should have made this provision, seeing that the duty of maintaining schools is exacted under penalties from the inhabitants of towns, it may be answered, that it was probably contemplated that some parishes might be desirous of maintaining schools of a different description from those required to be supported by towns, and that it was expedient to grant the power of so doing, though it was not exacted as a duty. Singing schools, for instance, and what are now so common under the name of Sunday schools, are of a parochial, rather than a municipal character. It is sufficient to know however that parishes have the right, to authorize us to determine that property given for that purpose may be held by them. Certainly they cannot apply the property so given to any other use; and if they fail to appropriate it according to the will of the donor, they will either be compelled to execute the trust confided to them, or will forfeit their right to the property. By the common law it was the right of corporations to take and hold property, both real and personal, to their own use, unless restricted by the terms of their charter, or by immemorial usage in such corporations as exist by prescription. This common law right has been taken away in England by the statutes of mortmain, so that now corporations can take and hold real estate only by license from the king, or by act of parliament if they derive their power from that source. 1 Bl. Com. 475, Christian's note; Co. Lit. 2. These statutes of mortmain seem never to have been reënacted, adopted or practised upon in this country,[1] but still it may be inferred from

[1] 2 Kent's Comm. (2d ed.) 283. But in Pennsylvania the statutes of mort-

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the special power given to various corporations, by acts of the legislature, to hold real estate to a certain limited extent, that corporations created for specific objects would not have the power to take and hold real estate for purposes wholly foreign to those objects. But with respect to our municipal corporations, though vested with no special power by their acts of incorporation, the usage has been to purchase and hold, and to take by gift and devise, estate real and personal, for the general use of the inhabitants; and it must be well known, that there is scarcely a town in the commonwealth which does not hold property to a greater or less amount acquired from some of these sources; and with respect to religious corporations we have a general statute, which establishes the mode in which their corporate power may be exercised over all property coming to them by gift or devise, without any limitation as to the amount.

We may consider it therefore as the settled law of this commonwealth, founded on immemorial usage as well as the implied assent of the legislative power, that towns and parishes may acquire and hold property for the use of the objects and purposes of those institutions; and that as parishes have the right by the statute above cited, to raise and collect taxes for the maintenance and support of schools, so they may enjoy all such property as may be devised to them in furtherance of that object. In the case of *Trustees of Phillips Academy* v. *King*, there is nothing contradictory to this doctrine; on the contrary, it is strongly intimated that such bodies are capable of taking and holding *in trust for others*, and such was the effect of the judgment in that case, the theological institution, which was the *cestui que trust*, being engrafted upon the corporation subsisting under the name of The Trustees of Phillips Academy. It was considered, that as the trust created was consistent with the purposes of the original institution, the corporation might be trustees of property so bestowed.[1]

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main have been held to be the law of that State, so far as applicable to their political condition. See the *Report of the Judges*, 3 Binn. Rep. *App.* 595.

[1] A corporation may be seised of land and hold other property in trust for purposes not foreign to its institution. *M'Girr* v. *Aaron*, 1 Rawle, Penrose & Watts, 49, *Greene* v. *Dennis*, 6 Connect. R. 304; 2 Kent's Comm. (2d ed.)

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The demandants in this case then having a capacity to take and hold the estate devised for the purpose declared in the will, it only remains to be considered, whether they have become seised under the devise, so as to be able to maintain this

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action; and this depends upon the question, whether they have made a lawful entry into the estate, it being very clear by the authorities cited, that without such entry the action cannot be sustained.

It was proved, that after the probate of the will, Amasa Roberts, claiming to act for and on behalf of the demandants, did in fact enter upon the estate devised and claim possession thereof for the said inhabitants. The validity of this act is questioned, on the ground that Roberts had no legal authority therefor derived from the demandants in their corporate capacity. He acted under votes of the parish passed on the 2d of May 1808, one of which was, "that the parish will take measures to obtain possession of the donation of the late Mr. John Cole, as expressed in the 2d article of the warrant,"—and the other, "that the parish will choose an agent or agents according to the 4th article,"—"that there shall be two agents," and that Estes Howe and Amasa Roberts be the agents. The duty of the agents, as described in the 4th article of the warrant, was "to institute or defend any suit or suits that may be commenced for or against them, and act any thing relative thereto." The warrant for this meeting was issued by three persons calling themselves the prudential committee of the parish, and it appears by the records in March preceding, that the persons who issued the warrant were "chosen to manage the prudential affairs of said society." This last mentioned meeting was held under a warrant from a magistrate of the county, which was issued on the application of certain persons under the statute which provides for such meetings in case no persons authorized to call such meetings should exist.

So far as the record goes it shows a regular meeting in March 1808, at which the parish was organized by the choice of proper officers, and if that meeting was legally called,

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283; *M'Cartee* v. *Orphan Asylum Soc.* 9 Cowen, 452; *Amherst Academy* v *Cowls*, 6 Pick. 427.

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the subsequent doings which resulted in the choice of the agents mentioned were regular and valid.

But the whole of these proceedings are objected to, on the ground that the original meeting was not legally called or held, it being offered to be proved at the trial that the application to 242 the magistrate, on which the warrant was issued, was not signed by ten qualified voters of the parish, and that at that and all subsequent meetings certain persons not members of the parish acted and voted. This evidence thus offered having been rejected by the judge, we must consider, for the purpose of this motion, the facts as actually proved, to wit, that the application for the warrant was not signed by ten qualified voters of the parish, and that persons not belonging to the parish did in fact attend the meeting and vote on the subjects which were acted upon at that meeting.

The *St.* 1786, *c.* 10. § 2, [Revised Stat. *c.* 20, § 17,] provides, that in case the assessors shall unreasonably refuse to call a meeting, or a parish or precinct shall have no assessors within it to call one, or not a major part of the assessors or committee which any parish may agree upon to be chosen, any justice of the peace for the same county, upon the application of ten or more of the voters in the parish or precinct, may call a meeting.

That a meeting called by a warrant which issued on the application of less then ten persons, or, if by that number, any of the applicants not being voters, might be excepted to as irregular by the inhabitants when assembled, and if excepted to, that all proceedings under it would be void, perhaps cannot be questioned; but that other persons not members of the parish may at any time afterwards question the legality of the meeting upon that ground, we are not prepared to say. It is not so strong a case as that of insufficient notice to the inhabitants, of the time and place of their meeting, for in such case injury is done to every inhabitant not notified, he having a right to attend and state his objections to, and vote against the measures proposed. It does not appear that any exception was taken to the meeting at the time, and we think that if there were regular notice appearing of record, and the inhabitants proceeded to transact the business for which they were called together, no defect of authority in the magistrate appearing of record, the

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legality of the meeting cannot afterwards be called in question; certainly not by any but the inhabitants themselves, who alone can be prejudiced by the form in which the application was made. In this respect the case is like that of *Thayer* v. *Stearns*, 1 Pick. 109, in which it was determined, that where it appeared by the records that notice had been given, this fact should not be contradicted by parol evidence. The affairs of towns and other bodies politic would be in great jeopardy, if it were competent to persons, not corporators, years after their transactions at public meetings had taken place, to go behind the record and prove some defect of authority antecedent to the meeting, in order to avoid their acts. The inhabitants themselves are alone interested in the manner in which they are assembled; if all have notice of the meeting and choose to proceed without inquiring into the qualifications of those who applied for the meeting, there seems to be no reason why others should find fault.[1]

The other branch of this objection stands upon the same footing. The tenant proposed to prove that persons not qualified to vote in parish affairs did in fact attend and vote, without stating how many persons of such character attended, so that it might be ascertained whether their agency had any effect on their proceedings. It was the duty and the right of the inhabitants assembled to challenge any person not qualified who offered to vote. Not having done so, we think it wholly unsafe, in regard to the interests of corporations, to allow of proof, after the meeting, of such a fact, with a view to vacate the proceedings. It is believed that a precedent to that effect would be extensively mischievous, as there can be no doubt that instances frequently occur in town as well as parish meetings, of persons being present who have not a right to vote, and the question whether they did vote or not would be liable to such uncertainty in the proof, that the very nature of the subject shows that the evil should be corrected at the time, instead of being left to remote periods afterwards.

[1] See *Gilmore* v. *Holt*, 4 Pick. 258; *Pejepscot Proprietors* v. *Ransom*, 14 Mass. R. 145; *Mussey* v. *White*, 3 Greenl. 290; *Waldron* v. *Lee*, 5 Pick. 326; *Blackburn* v. *Walpole*, 9 Pick. 100; *Ford* v. *Clough*, 8. Greenl. 334 *Willard* v. *Killingworth*, 8 Connect. R. 248.

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Another answer to the first branch of the objection is furnished by the argument of the counsel for the defendants, which is, that the agents were chosen at a meeting called by persons acting as a committee of the parish; and we think it clear that the actual exercise of that office under color at least of a regular election, is sufficient to render legal any meeting called by such a body, if no exception is taken at the meeting. 244

Still however it is objected, that admitting the agents to have been duly chosen, or that their choice cannot now be inquired into, yet the votes of the parish before recited did not give them authority to enter upon the land under the devise; and it is true that such authority is not expressly contained in the votes.

The first vote is, "to take measures to obtain possession of the donation of the late Mr. John Cole;" and the next, "to choose agents to institute or defend any suit or suits that may be commenced for or against them, *and act any thing relative thereto.*" These latter words, coupled with the expression of an intention to take measures to obtain possession, and the choice of agents expressly to institute suits, we think may fairly, and indeed must be construed to be an authority to do what was essential to the maintenance of a suit for the recovery of the land.[1]

There is however an objection, which though not insisted on by the counsel for the tenant we are bound to take notice of, and which, though merely technical, the tenant has a right to avail himself of.

It appears that the parish being called upon by the warrant to see if they would choose one or more agents or attorneys, voted to choose two, and did in fact elect Howe and Roberts. According to the testimony Roberts alone made the entry. Now it seems to be a settled principle of law, that where a bare authority is given to two persons, one alone cannot exercise it, nor if one dies, does the authority survive to the other. The cases put by *Coke* in his Commentary, 181 *b*, are decisive upon this point. He says, "if a man make a letter of attor-

[1] See *Damon* v. *Granby*, 2 Pick. (2nd ed.) 345.

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ney to two, to do any act, if one of them die, the survivor shall not do it." If a charter of feoffment be made, and a letter of attorney to four or three jointly or severally to deliver seisin, two of them cannot make liveries. So a bare power to executors to sell, must be executed by all jointly. Co. Lit. 112 *b*.[2] The only cases in which the rule of law may have been thought to be relaxed, is where committees of public bodies have been allowed to act by a majority, though the authority may seem to be joint;[1] but this is from reasons of policy and public good, which do not apply in the case before us.

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The objection is therefore fatal, unless the ground taken by the demandants' counsel in relation to the other objections is sufficient to remove it. They allege that admitting Roberts had no authority precedent to his entry, yet as he claimed to act for the demandants, and did actually enter under color of authority, his entry shall avail to their benefit, if they afterwards assented to and ratified his act;[2] and that the institution of this suit is conclusive evidence of such assent and ratification.

If it appear that the suit was instituted under their authority and is prosecuted with their consent, the above argument is sound; for by the authorities cited in the argument the position seems to be well supported, that an entry by a stranger shall avail him for whose use it was made, if adopted by him.[3] Whether it ought to be considered, that the mere commencement and pendency of the suit are a ratification, the authority of the attorney of the demandants not having been disputed, has been a matter of some doubt. It was offered to be proved at the trial, that there were no records of any parish meeting after the year 1813, which is nine years before the commencement of the suit. The authority to the agents by the vote of the parish in the year 1808, was to institute any suits, without

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[2] Paley on Princip. and Agent, 129; *Copeland* v. *Mercantile Ins. Co.* 6 Pick. 202, 203; *Damon* v. *Granby*, 2 Pick. 253.

[1] See *Moffitt* v. *Jaquins*, 2 Pick (2nd ed.) 332, note 1.

[2] *Copeland* v. *Mercantile Ins. Co.* 6 Pick. 203; Paley on Princip. and Agent, 143; *Smith* v. *Cologan*, 2 T. R. 189, note; *Fenn* v. *Harrison*, 3 T. R 757.

[3] Stearns on Real Actions, (2nd ed.) 75; *Fitchet* v. *Adams*, 2 Str. 1128.

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reference to this particular subject. We think, had the parish been called upon for their records, and had it appeared that nothing had been done in relation to this land for nine years after the entry of Roberts, and the fact of assent had been left to the jury, the issue might have been doubtful. But it seems to be a well settled principle, that when a suit is brought in the name of a corporation, if it is intended to deny the existence of the corporation, this should be brought in question by a plea in abatement, and that pleading over to the merits admits the capacity of the plaintiffs in the character they have assumed to act under. *Monumoi* v. *Rogers*, 1 Mass. R. 159.[4]

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In 1 Wms's Saund. 319, note 1, the doctrine in relation to entries made by strangers or persons without authority, and the use to be made of such entry by those who have the right, is considered at large; and the law appears to be, that the party, by assenting to such entry and acting upon it, makes it his own, and saves his rights by it. This is in relation to entries made necessary by statute to avoid a fine, and *Williams*, the annotator, says a slight recognition, and even the bringing an ejectment, is a sufficient ratification. Indeed it is laid down by Lord *Coke*, that "if an infant or any man of full age have any right of entry into any lands, any stranger in the name and to the use of the infant or man of full age may enter into the lands, and this regularly shall vest the lands in them without any commandment, precedent, or agreement subsequent." Co. Lit. 258 *a*. Probably Lord *Coke* meant to say such entry would be good without any express command or express subsequent agreement, which is also contended for in this case. The point is of no other importance in the case than as it respects the costs of this suit, for the demandants having the right, and twenty years since their right accrued not having elapsed, they might by entry maintain another action. But we think the case well supported by authority and principle, for entry has been made in the name and to the use of the demandants by a

[4] *Methodist Episcopal Church of Cincinnati* v. *Wood*, 5 Ohio R. 286.

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person believing that he acted under authority from them They have adopted his act by bringing their action and relying upon his act as their entry. This is a sufficient ratification.

Judgment on the verdict.

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[1] See *Fryeburg Canal* v. *Frye*, 5 Greenl. 38.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF MIDDLESEX, OCTOBER TERM 1825, AT CAMBRIDGE.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON, }

GEORGE JOHNSON *et al.* in Error, *versus* JOSIAH WETHERBEE.

In trespass a plaintiff recovered a verdict for 275 dollars, and afterwards judgment was rendered for 308, being the former sum with interest. The defendant reviewed and a verdict was returned for 300 dollars; the first judgment was thereupon affirmed and the plaintiff took judgment for 300 dollars and costs. Upon error it was *held*, that the first judgment should have been affirmed in part only, and that the defendant was therefore entitled to the costs of the review.

THE defendant in error was the original plaintiff in an action of trespass. The case involved a question of costs depending upon *St.* 1786, *c* 66, respecting reviews in civil actions. It was argued at the October terms in 1822 and 1823, and afterwards in writing, by *T. Fuller* for the plaintiff in error and *Fay* for the defendant. The facts will appear in the opinion of the Court, which was delivered by

WILDE J. This is a case in error, and must be decided on principles of strict law. So that whatever hardships may result to either party from the decision, no appeal to the discretion of the Court to avoid it can prevail. *Oct.* 17th.

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Johnson v. Wetherbee.

The question is, whether the error assigned is such as authorizes and requires us to reverse the judgment. The judgment was rendered in this Court in an action of review, in which the plaintiffs in error were also plaintiffs in review, and defendants in the original action. On the trial of the original action a verdict was returned for the plaintiff, and damages were assessed in the sum of 275 dollars. An appeal was claimed by the original defendants to the Circuit Court of the United States, and judgment was thereby delayed two years. The appeal was not sustained, and judgment on the verdict was rendered, with interest for the intervening delay, being 33 dollars. The defendant sued out a writ of review, and on a trial of the review a verdict was returned for the original plaintiff, and damages were assessed in the sum of 300 dollars. Whereupon judgment was rendered in the words following, *viz.* — "It is therefore considered by the Court here, that the former judgment which remains wholly unsatisfied be affirmed. And it is further considered by the Court here, that the said Wetherbee recover against said Johnson *et al.* defendants, the sum of three hundred dollars damages, which includes the principal sum of damage in said former judgment, and costs of this and said former suit."

It is manifest that this judgment cannot be sustained, unless the Court were authorized to add the interest computed in the original action, to the damages estimated by the jury on the review. And it is equally manifest, we think, that the Court had no such authority. The jury are the legal and exclusive judges of the damages. If they assume an incorrect rule in assessing them, the remedy is by motion for a new trial. But in the case under consideration it does not appear by what rule of computation the damages were assessed; whether interest was taken into consideration at all, or if it were, whether it was computed up to the time of the rendition of judgment in the original suit, or to the time when the verdict was returned. The legal presumption is, nothing appearing to the contrary, that if the subject of interest was taken into consideration, it was computed up to the time when judgment was rendered;
249 for it is clear that such was the legal and correct rule of computation. It does not appear whether the jury had any instruc-

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tions on this point or not, but if they had any such instructions, and the instructions were wrong, which however is not pretended, the defendant in review should have tendered his exceptions. If therefore it appeared by the record that the jury did not allow interest, or allowed it only up to the time of the first verdict, it would not authorize the Court to increase the damages; they could only order a new trial. But as it does not appear upon what principles the jury estimated damages, we are bound to presume that they were estimated correctly. It follows, therefore, that the judgment on the review could be only for 300 dollars damages, and such was the judgment rendered. But it is erroneous in affirming the judgment in the original suit, which was for 308 dollars damages. It ought to have been reversed in part. It is erroneous also in giving costs of review to the original plaintiff. The plaintiff in review was the prevailing party in that suit, and by the statute was entitled to costs. It has been argued that he was guilty of laches in not moving for judgment for his costs. But the practice does not require that such a motion should have been made. The judgment therefore is clearly erroneous and must be reversed; and the judgment which ought to have been rendered will be now entered. This judgment is, that the judgment in the original suit is affirmed in part, *viz.* for the sum of 300 dollars damages and costs of suit in said original action, and that the same be reversed as to the residue; and that the plaintiff in review recover his costs of suit in that action.

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SAMUEL FLETCHER, Junior, *versus* PETER R. L. STONE.

Two or more rights in equity of redeeming several parcels of land from several mortgages, when sold on one execution, ought to be sold separately and not for a gross sum; for the debtor has a right to redeem one equity sold, without redeeming the others; but a joint sale cannot be avoided by a stranger.

THIS was a writ of *entry sur disseisin*, in which the demandant declared on his own seisin within twenty years and a disseisin by the tenant. A trial was had upon the general issue.

The demandant proved, that on the 25th of February 1823, one Abbot attached the right in equity of Phineas Wright to redeem the land from his mortgage to M. Ditson; that Abbot recovered judgment on the 16th of March 1824; that the equity was taken on his execution on the 12th of April, and sold and a deed of it given to the demandant on the 17th of May, and that on the 22nd the demandant actually entered.

The tenant claimed by virtue of a sale upon a prior attachment and levy in an action brought by him against Wright. The objection to his title was, that the officer put up to auction at the same time the right to redeem the land in question, and also the right to redeem another parcel from another mortgage, and that the tenant purchased both equities for a gross sum, without distinguishing the value of each.

On the part of the tenant it was contended that the objection was of no validity, and further, that all parties interested consented to that mode of sale. To prove the latter, various evidence, unnecessary to be detailed, was introduced, part of which was, that the tenant and Calvin Fletcher, who by a deed of May 9, 1823, was the assignee of the mortgager, subject to the attachments before mentioned, had agreed that the two equities should be thus sold together.

A verdict was taken for the demandant subject to the opinion of the Court.

251 *Dec. 4th, 1824.* The case was argued for the demandant by *Abbot* and *Hoar*; and for the tenant by *S. D. Ward*, who cited *Barnard* v. *Fisher*, 7 Mass. R 74

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Fletcher v. Stone. Oct. 17th, 1825

WILDE J. delivered the opinion of the Court. The tenant's title, if not defective, must prevail, his being the elder title, and both parties claiming by different sales from the same person.

The tenant holds under a sheriff's sale, at which the right of redeeming the demanded premises from the incumbrance of a mortgage, and the right of redeeming another tract from another mortgage, were struck off and sold at a gross sum, and without distinguishing the price of each.

This sale the demandant's counsel contend was irregular and void.

The language of the statute regulating the sales of equities on execution is general, and as to the point in question very indefinite. There is no clause expressly authorizing or prohibiting the joint sale of two or more equities; so that the question is not whether the sale is void, being expressly declared to be so by the statute, or being prohibited in this form; or because the statute requires it to be made in some other form; but rather, whether it is not void or voidable, by the principles of the common law, as being an infringement of the rights of the debtor, or of others interested in the estate.

By the 3d section of St. 1798, c. 77, [Revised Stat. c. 73, § 37, 38, 39, 42,] it is provided, that all rights in equity of redeeming real estate mortgaged, shall be liable to be attached on mesne process, and taken in execution upon judgment for the payment of the just debts of the mortgager; and the officer having such execution is authorized to make sale of the same at public vendue, and to make, execute, acknowledge and deliver to the highest bidder good and sufficient deed or deeds of any estate so sold. The 4th section requires notice to be given of the time and place of sale; and that the surplus moneys (if any there shall be) arising from such sale, beyond satisfying the debt, costs and necessary intervening charges, shall be returned to the debtor. The 5th section provides, that the debtor shall have liberty to redeem the right in equity so sold, by paying the sum which may by 252
such sale have been satisfied on such execution, with interest.

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Fletcher v. Stone

The demandant's counsel rely upon this last mentioned section as conclusive against the validity of the sale in question. They contend that when two or more equities are sold on execution, the debtor has a right to redeem any one of them, without redeeming the others; and that a joint sale is inconsistent with the exercise of this right.

On the other hand, the tenant's counsel contend, that whether the sale in such case be joint or separate, the debtor has no right to redeem any one equity without redeeming the whole; and even if he had such right, it would not be infringed by a joint sale, as there might be a just apportionment made of the relative value of each right in equity, should the debtor elect to redeem only one of the equities.

On this point we are of opinion that the debtor has a right, by a fair construction of the statute, to redeem one equity, without redeeming the others, when several equities are sold on the same execution. This construction best agrees with the language of the statute, and generally the right of redemption is to be favorably considered. We think also that this right must be necessarily impaired, if not destroyed, should a joint sale be allowed to be valid as against the debtor. The principle of apportioning the relative value of property, which depends on opinion and is not founded on the basis of certainty, ought not to be resorted to except in cases of necessity.[1]

But admitting that without the consent of the debtor, or his assignee, the sale under consideration would have been void as to them, it does not follow that it is void as to strangers. The question then is, whether such a sale is to be considered void, or only voidable.

The books do not distinguish very accurately between void and voidable acts; but some rules and distinctions may be collected from adjudged cases, which appear applicable to the question.[2]

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[1] But where an execution has been extended upon two or more parcels of land, the debtor is not entitled to redeem one of them alone, without the others, even though its value be separately stated in the certificate of the appraisers. *Foss* v. *Stickney*, 5 Greenl. 390; *Bond* v. *Bond*, 2 Pick. 382.

[2] See *Arnold* v. *Fuller*, 1 Ohio R. 458; *Barr* v. *Hatch*, 3 Ohio R. 530

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Acts which affect injuriously the public interest are generally void; and those which affect only private rights are voidable. *Boynton* v. *Hubbard*, 7 Mass. R. 112.

Thus acts which are *mala in se* are generally absolutely void; and no right or claim can be derived from any such acts. For it is the wise policy of the law to discourage, as far as possible, all acts which are prejudicial to public morals. 7 Bac. Abr. *Void and Voidable*, *B*.

But acts which are only *mala prohibita* are either void or voidable, according to the nature and effects of the act prohibited.[1] If it concerns the public good, it is generally to be considered void; but if it is prohibited for the purpose of securing the private rights of the parties interested, it is only voidable. Where the public interest is not concerned, it is sufficient to allow the party who may be prejudiced by an unlawful sale or contract, to avoid it. It is on this ground that a mortgage or assurance given on a usurious consideration, has been held only voidable, notwithstanding the strong words of the statute. *Green* v. *Kemp*, 13 Mass. R. 515. And this decision is not inconsistent with those cases in which it has been ruled, that a negotiable note or bill of exchange upon a usurious consideration, is void in the hands of an indorsee for a valuable consideration, and without notice of the usury. For these cases only show that such note or bill may be avoided even in the hands of an innocent indorsee; and not that the contract is merely void.

So fraudulent conveyances made to defraud creditors are not void, but voidable; not because of the peculiar language of the statute, for the same distinction is made in cases where

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Hart v. *Johnson*, 6 Ohio R. 90; *Douglass* v. *Scott*, 5 Ohio R. 200; *Colsen* v. *Figgins*, 1 Breese, 3; *Cornelius* v. *Cohen*, 1 Breese, 92. See the reasoning upon the distinction between the void and voidable acts of infants, in Bingham on Infancy, *ch.* 2 *et seq.*; *Zouch* v. *Parsons*, 3 Burr. 1794; 2 Kent's Comm. (2d ed.) 235 *et seq.*

[1] See *Wheeler* v. *Russell*, 17 Mass. R. 258, 263. Any distinction between acts *mala in se*, and those *mala prohibita*, seems to be strongly reprobated by *Rooke* J., in *Aubert* v. *Maze*, 2 Bos. & Pul. 375, where he says, that a moral man is as much bound to obey the civil law of the land, as the law of nature. See also Chitty on Contracts, (3d Amer. ed.) 231; *Bensley* v. *Bignold*, 5 Barn. & Ald. 341.

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the conveyance is fraudulent, as against creditors or others, by the principles of the common law.[a]

In the case of *Smith* v. *Warren*, 1 Rol. Rep. 158, it was held, that though the statute of *Westm.* 2, (13 *Ed.* 1,) *c.* 1, says, *finis ipso jure sit nullus*, yet it is not void as against the party, or his issue, or him in reversion; but the issue and he in reversion have remedy to avoid it. So where the statute of additions enacts, that if any be outlawed without addition, the outlawry shall be clearly void and of no effect, yet it shall not be void without writ of error. Ibid. 159; 7 Bac. Abr. *Void and Voidable, C.*

So also an execution against one holding lands in joint tenancy or tenancy in common, cannot be extended on a
254 part of the lands so holden, by metes and bounds, to the prejudice of the other cotenants; yet such an extent is only voidable by the cotenants. *Varnum* v. *Abbot et al.* 12 Mass. R. 476.

This last cited case was determined after much deliberation, and is supported by the soundest principles. It has a very close analogy to the case under consideration, and seems conclusive as to the question now raised.

Considering then the sale to the tenant as only voidable, the remaining question is, whether the demandant has shown any right to avoid it. And we think it very clear that he has not. He had no right to redeem the equity. This right had not been attached, nor was it by law liable to attachment, or to be sold on execution, as was determined in the case of *Kelly et ux.* v. *Beers*, 12 Mass. R. 387. The right to redeem the equity remained in the debtor until he assigned it to Calvin Fletcher, at whose request the two equities were jointly sold. The demandant therefore cannot be prejudiced by the mode of sale, unless he can show that the amount of the sale was thereby reduced, and that if the equities had been sold separately there would probably have been a surplus of money

[a] *Burjett* v. *Burjett*, 1 Ohio R. 48; *Barr* v. *Hatch*, 3 Ohio R. 530; *Findley* v. *Cooley*, 1 Blackford, 263; *Somes* v. *Brewer*, 2 Pick. 194 *et seq.*; *Harris* v. *Sumner*, 2 Pick. 129; Fonbl. on Eq. (Laussat's ed.) 217 to 225, and notes See *Mackie* v. *Cairns*, 1 Hopkins, 405; *S. C.* 5 Cowen, 547; *Hildreth* v. *Sands* 2 Johns. Ch. R. 42.

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after satisfying the tenant's execution. But this question was not made at the trial, nor does the evidence reported warrant the belief that it could have been with any hope of success.[1]

The verdict is to be set aside and a verdict entered for the tenant.

LEWIS WHEELER *versus* ISAAC TRAIN. 255

Where a debtor in failing circumstances agreed to convey furniture in part payment of a debt, and at the same time stipulated with the creditor to have a lease of it for a year, and the transfer and lease were accordingly made, it was *held*, that this was not conclusive evidence that the sale was fraudulent as against other creditors.

Such vendee cannot, pending the lease, maintain replevin, nor any other action, against an officer who attaches the furniture as the property of the lessee.

In such an action a plea by the officer that the property was in the lessee when he attached it, without setting out his title specially, is good after verdict; and so (per *Wilde* J.) *it seems* upon demurrer.

THIS was an action of *replevin* for certain household furniture. The defendant pleaded that the property in the furniture was in John Wheeler, when he as a deputy sheriff attached it for some of the creditors of John Wheeler. The plaintiff replied property in himself, and issue was joined thereon.

At the trial, before *Putnam* J., it was proved by John Wheeler, that Lewis Wheeler was his creditor upon notes of hand given for money borrowed; and it was agreed between them, that the furniture should be appraised, and that John should convey it to Lewis absolutely, and that Lewis should allow the amount for which it should be appraised, on the notes, and should give a lease of the furniture to John for one year. Accordingly, an appraisement and a bill of sale were made, and the amount of the appraisement was indorsed on the notes. A chair was delivered before witnesses as and for a delivery of all the furniture, and a lease was then made by Lewis to John for one year, according to the agreement, at a rent of 90 dollars a year, payable semiannually; and John

[1] See 1 Powell on Mortg. (Rand's ed.) 254 *a*, note 1.

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remained in possession of the furniture until the defendant attached it, which was within a year from the date of the lease. The witness also testified that the bargain was a fair one, and that the sale was unconditional, as the paper purported.

There was evidence tending to show that the transfer was made to delay or defraud creditors, and evidence on the part of the plaintiff tending to rebut it; concerning which no question arose.

256 The defendant contended, that upon the testimony of John Wheeler the conveyance was void as against his creditors, because it contained evidence of a secret trust and advantage which were reserved for him in the agreement for, and the lease of, the furniture. But the jury were instructed, that if they believed that the transaction was *bonâ fide*, and that the plaintiff paid the fairly appraised value of the furniture, and that the bill of sale was made pursuant to the agreement for the purpose of extinguishing so much of the debt due to the plaintiff, and also for the purpose of obtaining a lease of the furniture, it was not *per se* conclusive evidence of such a trust or benefit for John Wheeler as would render the sale void as against his creditors; that it made no difference in law whether the agreement for the lease were made before the bill of sale or after, if the jury believed that the agreement in itself was fair, and the bill of sale and delivery and lease were made fairly in execution of the agreement and with no intent to delay or defraud creditors.

The defendant contended also, that John Wheeler was lessee for the residue of the year of the furniture attached, and that therefore the verdict should be that the property was in him, but the jury were instructed otherwise.

These points were intended to be reserved for the opinion of the whole Court, and the verdict, which was for the plaintiff, was to be subject to that opinion.

Oct 14th *Hoar* for the defendant. The Court have decided that a vendor's remaining in possession is not conclusive evidence of fraud. This case however goes much further. The question here is, whether a debtor, being insolvent, can make a bargain with an existing creditor for a sale of goods, reserving a right to a future use in himself. In *Northampton Bank* v

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Whiting, 12 Mass. R. 110, it is said, that "fraud which vitiates conveyances consists generally in an intention to secure, by the conveyance, some interest in the property to the grantor, or some future right in it." The conveyance in question comes within this very accurate description of fraud. If this transaction can be supported, the vendor may stipulate for the use of the goods for any number of years. In *Sturtevant* v. *Ballard*, 9 Johns. R. 341, *Kent* C. J. takes the distinction of the sale's being made to a *creditor*, and cites *Kidd* v. *Rawlinson*, 2 Bos. & Pul. 59, and *Meggot* v. *Mills*, 1 Ld. Raym. 286. Why should not this transaction be considered fraudulent, in like manner as it is held fraudulent in a creditor signing a bankrupt's certificate, to stipulate for the payment of more than his dividend? It is not a sufficient answer, that the value of the furniture was indorsed on the notes. The debtor was taking an undue advantage. 25*i*

The plaintiff cannot maintain replevin, because he had not a right to the immediate possession when his suit was commenced. *Gordon* v. *Harper*, 7 T. R. 9; 1 Chit. Pl. 159.

Fay, *contrà*. The issue is, whether the general property was in the plaintiff, and the jury have found that it was. The defendant might have pleaded a special property in John Wheeler and thus have defeated our action for a few days, but on the issue joined evidence of the outstanding term was inadmissible, except to prove fraud. By taking more than the special owner had, a trespass was done to the general owner.

As to the conveyance, it was only giving a preference to one creditor over another. It is not found that an agreement to make the lease was a condition of the sale, but it is apprehended that the debtor had a right to stipulate for a compensation for giving such preference. To make the conveyance void there must be a secret trust, a sham sale. Here every thing was open and *bonâ fide*.

WILDE J. delivered the opinion of the Court. As to the first question made in this case, in relation to the validity of the sale, we think the jury were rightly instructed. The possession of the vendor after the sale, is not a conclusive badge of fraud. It may be so when unexplained, but it is always open Oct. 17th

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to proper explanations. It is evidence of fraud, and not fraud *per se*, and so it has always been considered in this Court [1] We think also that the explanation in this case is satisfac-

[1] The doctrine of the text seems to be countenanced by the following English authorities. *Eastwood* v. *Brown*, Ryan & Moody, 312; *Wooderman* v. *Baldock*, 8 Taunt. 676; *Martindale* v. *Booth*, 1 Barn. & Adol. 498; *Storer* v. *Hunter*, 3 Barn. & Cressw. 368; *Latimer* v. *Batson*, 4 Barn. & Cressw. 652; *Irons* v. *Smallpiece*, 2 Barn. & Ald. 551; *Steel* v. *Brown*, 1 Taunt. 381. It has been adopted in the State of Maine; *Ulmer* v. *Hills*, 8 Greenl. 326; *Reed* v. *Jewett*, 5 Greenl. 96; *Holbrook* v. *Baker*, 5 Greenl. 309: — In New Hampshire; *Lewis* v. *Whittemore*, 5 N. Hamp. R. 364; *Haven* v. *Low*, 2 N. Hamp. R. 13; *Coburn* v. *Pickering*, 3 N. Hamp. R. 415: — In Connecticut, with some limitations; *Ingraham* v. *Wheeler*, 6 Connect. R. 277; *Talcot* v. *Wilcox*, 9 Connect. R. 134; *Swift* v. *Thompson*, 9 Connect. R. 63; *Toby* v. *Reed*, 9 Connect. R. 216: — In New York; in *Bissell* v. *Hopkins*, 3 Cowen, 166; see also *Divver* v. *M'Laughlin*, 2 Wendell, 599; *Jackson* v. *Timmerman*, 7 Wendell, 436; *Wilcox* v. *Wood*, 9 Wendell, 346: — In North Carolina; *Howell* v. *Elliott*, 1 Badg. & Dev. 76; *Vick* v. *Kegs*, 2 Haywood, 126; *Falkner* v. *Perkins*, 2 Haywood, 224; *Smith* v. *Niel*, 1 Hawks, 341; *Trotter* v. *Howard*, 1 Hawks, 320: — In South Carolina; *Terry* v. *Belcher*, 1 Bailey, 568; *Smith* v. *Henry*, 2 Bailey, 118. The court of Ohio seems to approve of the same doctrine, in *Barr* v. *Hatch*, 3 Ohio R. 529. So the court of Tennessee; *Callen* v *Thompson*, 8 Yerger, 475. The same has been reasserted and maintained in many cases in Massachusetts; *Adams* v. *Wheeler*, 10 Pick. 199; *Ward* v. *Sumner*, 5 Pick. 59; *Shumway* v. *Rutter*, 7 Pick. 56; *S. C.* 8 Pick. 443; *Holmes* v. *Crane*, 2 Pick. (2d ed.) 612, note 1; *Gould* v. *Ware*, 4 Pick. 104; *Ward* v. *Gould*, 5 Pick. 291; *Flagg* v. *Dryden*, 7 Pick. 52.

A contrary doctrine seems to have received the approbation of the Supreme Court of the United States, in *Hamilton* v. *Russell*, 1 Cranch, 309; and of the U. S. Circuit Courts of Pennsylvania and Massachusetts, in the *United States* v. *Conyngham*, 4 Dallas, 358; *Phettiplace* v *Sayles*, 4 Mason, 321, 322. But see *Conard* v. *Atlantic Ins. Co.* 1 Peters's Sup. Ct. R. 449; *De Wolf* v. *Harris*, 4 Mason, 515. — So of the courts in Virginia; *Clayton* v. *Anthony*, 6 Randolph, 285; *Land* v. *Jeffries*, 5 Randolph, 211; *Robertson* v. *Ewell*, 3 Munf. 1; *Alexander* v. *Deneale*, 2 Munf. 341: — In Pennsylvania; *Dawes* v. *Cope*, 4 Binn. 258; *Babb* v. *Clemson*, 10 Serg. & Rawle, 419; *Shaw* v. *Levy*, 17 Serg. & Rawle, 99; *Hower* v. *Geesman*, 17 Serg. & Rawle, 251; *Levy* v. *Wallis*, 4 Dallas, 167: — In New Jersey; *Chumar* v. *Wood*, 1 Halsted, 155; but see *Mount* v. *Hendricks*, 2 Southard, 738: — In Kentucky; *Baylor* v. *Smithers*, 1 Littell, 111, 112: And in Vermont; *Boardman* v. *Keeler*, 1 Aiken, 158; *Mott* v. *M'Niel*, 1 id. 162; *Weeks* v. *Wead*, 2 id. 64; *Fletcher* v. *Howard*, 2 id. 115; *Beattie* v. *Robin*, 2 Vermont R. 181; see *Harding* v. *Jones*, 4 Vermont R. 462.

In *Jackson* v. *Timmerman*, 7 Wendell, 436, it is held, that there is no such thing as *fraud in law*, as distinguished from *fraud in fact;* what was formerly considered as fraud in law, or conclusive evidence of fraud, and to be so pronounced by the court, is now held to be but *primâ facie* evidence, to be sub-

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sory. As a debtor may mortgage his property to his creditor, and retain possession until condition broken, if such is the agreement, we can perceive no good reason why he may not stipulate for possession for a given time, when the sale in other respects is absolute, provided there is no fraud or concealment. And certainly none appears by the evidence.

But the other objection to the plaintiff's title is insuperable. At the time of suing out the replevin the plaintiff had no right of possession, and consequently no right of action. No tortious taking or detention has been proved. The lessee during the lease was entitled to the beneficial use of the property; and this right was liable to attachment, and to be sold on execution. The defendant was therefore in the rightful possession of the property, and is not liable either in replevin, or in any other action.

The case of *Gordon* v. *Harper*, 7 T. R. 9, is a strong authority on this point, and the reasoning of the court is entirely satisfactory. That case was trover, but we think that the action of replevin depends upon the same principles. During the continuance of the lease the property is in the lessee, and the lessor has only a reversionary interest. But to maintain replevin or trover the plaintiff must have the right of property, including the right of possession, at the time of taking, or at the time of suing out his writ. Co. Lit. 145 *b*. A reversionary interest is not sufficient; for if the defendant in replevin has the right of possession, the caption cannot be tortious.

The objection made to the plea is certainly not good after verdict. If it were necessary, by the strict rules of pleading, for the defendant to set out his title specially, the objection should have been made on demurrer. I am of opinion that the plea would be held good on demurrer, but without determining this point, it is clear that the objection comes too late. If a title is defectively set out the defect is cured by verdict. The defendant is entitled, on the principles laid down, to a verdict in his favor and judgment accordingly.[1]

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mitted to and passed upon by the jury. See also *Seward* v. *Jackson*, 8 Cowen, 448, 454; *Jackson* v. *Peck*, 4 Wendell, 303.

[1] See Howe's Pract. 78.

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EDMUND BLOOD, Junior, *versus* NATHANIEL AUSTIN.

A demand by a gaoler, pursuant to *St.* 1821, § 22, [Revised Stat. c. 90, § 113, 114,] of security for the board of a person committed on mesne process or execution, need not be made in any precise form; it is sufficient if it is understood by the creditor, &c.

If the debtor represent himself to the gaoler as a pauper and claim support, it is a sufficient "claim of relief as a pauper" under that statute, without any application to overseers of the poor.

DEBT against the defendant as sheriff of this county for an escape of one Ames, who was committed on execution to the gaol in Concord.

The defendant relied on *St.* 1821, c. 22, which provides (§ 1) that when any person confined in close prison on mesne process or execution shall claim relief as a pauper, the keeper of the prison shall after twenty-four hours furnish relief at the charge of the creditor; and (§ 2) that when the keeper, at the time of the commitment, shall require of the creditor or his attorney, or of the officer committing, security for the expense of supporting the debtor, in case he shall claim relief as a pauper, unless satisfactory security is given the keeper may discharge the debtor after twenty-four hours from the time of his claiming such relief.

The defendant proved by the officer who committed Ames, that at the time of the commitment inquiry was made by the wife of Moore, the deputy gaoler, as his agent, he being then absent, who would pay for Ames's board; that the officer told her that no provision would be made by the creditor, nor by his attorney, and that he himself had no authority from any one to become responsible.

The defendant also proved that Ames continued in close confinement about thirty hours; that when first imprisoned he told Mrs. Moore he must be supported, as he could not support himself; that at the expiration of the thirty hours he told Moore he wished application might not be made to the overseers of the poor of the town where he belonged, for payment of his board during the thirty hours, as the inhabitants were mean about such things; that he paid Moore all that was due

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to him, except a few cents which he afterwards paid, and Moore discharged him.

The trial was had in the Court of Common Pleas before *Strong* J. who was of opinion that a sufficient requirement was made by the gaoler for security for Ames's support, and sufficient claim for relief as a pauper was made by Ames; and that consequently the defendant was not liable for an escape. The plaintiff filed his exceptions, alleging 1. that a more particular and definite demand should have been made on the creditor, &c., for security for the prisoner's board, and 2. that the prisoner or gaoler should have made complaint to the overseers of the poor of Concord, pursuant to *St.* 1793, *c.* 59, § 13, in order to make sufficient claim for relief as a pauper, to justify the defendant in discharging the prisoner.

Butler supported the exceptions. *Oct.* 14*th*

Hoar for the defendant.

Per Curiam. The demand for security was sufficient. It was made in such terms that the officer who committed the debtor could not mistake it; and his answer that neither the creditor nor his attorney would make any provision or give any security, rendered any other demand unnecessary, he being by the statute an agent whose refusal would bind the creditor. *Oct.* 17*th*

We think also the claim for support made by the prisoner sufficient. He represented himself as a pauper and claimed support, which is all the law intends. If he were notoriously able to support himself, this might be shown as evidence of collusion between him and the officer, and it would not avail the officer in his defence.[1]

Judgment affirmed.

[1] *Richards* v. *Crane*, 7 Pick. 216.

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JOHN WALKER *versus* JOSEPH BRADLEY.

Where an administrator pays a debt in full, upon an erroneous belief that the estate of his intestate is solvent, an action to recover back part of the money paid does not accrue until the insolvency of the estate is ascertained by a decree of insolvency and order of distribution; and consequently, the statute of limitations begins to run from that time.

A demand of repayment was made after such decree, and interest was allowed only from the time of such demand.

UPON a case stated the facts were these. On the 8th of June, 1814, John Walker died, intestate, indebted to the defendant upon a promissory note. On the 31st of December following, the plaintiff, being administrator on the estate of the intestate, paid the sum due to the defendant. In October 1817, the estate was represented insolvent, and on the 3d of March, 1820, a decree of distribution was passed in the probate court, ordering sixty cents only on a dollar to be paid to creditors on the amount of their claims ascertained and reported by commissioners. The plaintiff now demanded forty per cent. of the amount of the defendant's claim, as reported, with interest; that proportion having been paid by the plaintiff over and above what the estate would pay, by mistake or ignorance of the facts. A demand was made on the defendant on the 1st of May, 1822. The action was commenced in 1824.

Oct. 14th. The cause was argued by *W. Richardson* for the plaintiff, and *Hoar* for the defendant.

Oct. 17th. WILDE J. delivered the opinion of the Court. On the facts agreed the plaintiff is entitled to recover, on the principles laid down in the case of *Walker* v. *Hill*, 17 Mass. R. 380, unless his right of action is barred by the statute of limitations.[1] This depends on the question when his right of action first accrued. The defendant's counsel contends that it accrued immediately on payment of the money. But it is very clear, we think, that no action could have been maintained, without proof that the estate was insolvent; and no proof, short of a decree of the judge of probate to this effect, would have been sufficient.

[1] 1 Story on Equity, 109, note 4, 110, note 1.

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Did it then accrue on the representation of insolvency? We think not, for such representation is no proof that the estate was in fact insolvent; and if it were, the extent of insolvency could not have been ascertained but by a decree of insolvency and order of distribution. Before such decree and order the plaintiff had no legal means of ascertaining the amount of his claim, and could not sustain an action. It follows therefore that no right of action accrued before the final decree of insolvency. This decree was passed on the 3d day of March, 1820.

There is no analogy between the case under consideration and the common case of money paid by mistake. In the latter case an action lies immediately to recover back the money. The legal remedy is perfect, notwithstanding the ignorance of the party. But in the present case, if the plaintiff had discovered the insolvency of the estate immediately after payment of the money, he nevertheless had no legal remedy until the decree of insolvency. On the passing of that decree, therefore, his right of action first accrued.

Richardson, after the opinion was delivered, said that, in equity, interest ought to be allowed from the time when the money was paid.

WILDE J. We can allow interest only from the 1st of May, 1822.[1]

Judgment for the plaintiff.

[1] See *Wood* v. *Robbins*, 11 Mass. R. 504; *Winthrop* v. *Carleton*, 12 Mass. R. 4; *Dodge* v. *Perkins*, 9 Pick. 368. In England interest is not in general recoverable in an action for money had and received. *De Bernales* v. *Fuller*, 2 Campb. 426; *De Havilland* v. *Bowerbank*, 1 Campb. 50; *Crockford* v. *Winter*, 1 Campb. 129; *Calton* v. *Bragg*, 15 East, 224; *Higgins* v. *Sargent* 2 Barn. & Cressw. 351. Indeed the English courts have so often decided that interest is not recoverable in an action for money had and received, that the judge at nisi prius will not allow the question to be agitated. *Depeke* v. *Munn*, 2 Carr & Payne, 112; *Hicks* v. *Mareco*, 5 Carr. & Payne, 498.

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COMMONWEALTH *versus* CHARLES JONES HAIL.

C. J. H. was enrolled in a company of militia by the name of C. H. *Held*, that he was not duly enrolled.

On the back of a sergeant's warrant was a certificate, that he had "taken and subscribed the oath according to law before me J. T. W. commanding officer." *Held*, that this was not a sufficient certificate of his being appointed clerk of the company, and that it could not be amended by inserting proper words of appointment, to sustain a prosecution commenced by him as clerk. [See Revised Stat. c. 12, § 112.]

CERTIORARI to a justice of the peace, who had fined the respondent for neglecting to appear at a meeting of a militia company commanded by John T. White.

263 At the trial before the justice, the complainant produced the book of enrolment of the company, which contained the name of Charles Hall, but not of Charles Jones Hall, the true name of the respondent.

The warrant appointing the complainant a sergeant in the company was also produced, on the back of which were written the following words: — "Medford, April 20th, 1824. This may certify that the within named Willard Butters has taken and subscribed the oath according to law before me, John T. White, commanding officer." The respondent objected to this certificate, and the complainant thereupon moved for leave to amend it by inserting the words, "I hereby appoint the within named Willard Butters clerk" &c.

Oct. 14*th.* *Bartlett* now objected that the respondent was not duly enrolled; *St.* 1809, c. 108, § 8, 20; and that the complainant was not legally appointed clerk of the company. *St.* 1809, c. 108, § 8.

Oct. 17*th.* MORTON J. delivered the opinion of the Court. By Laws U. S. 2 *Cong.* 1 *Sess.* c. 33, § 1, it is made the duty of the commanding officer of every company of militia to enrol every person liable to militia duty within the limits of his company. And by the militia law of this commonwealth (*St.* 1809, c. 108, § 8) the clerk is required to keep "a fair and exact roll of the company" and from time to time to revise and correct the same, so that it shall contain the names of all persons within the bounds of his company subject to militia duty. Unless thus enrolled and duly notified

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thereof, no person can be holden to perform this onerous service.

The roll of White's company contained the name of Charles Hall, but not the name of Charles Jones Hall. Charles Jones is the respondent's Christian name. It needs no argument to prove that Charles and Charles Jones are different names.[1] *Commonwealth* v. *Perkins*, 1 Pick. 388. The respondent therefore was not duly enrolled in the company of which the complainant claims to be clerk.

The clerk of a company is an officer who has important duties to perform. He alone is authorized to prosecute for all fines and forfeitures incurred by the delinquencies of the 264
non-commissioned officers and privates. The mode of his appointment is fixed by statute. He must be selected from the sergeants of the company by the commanding officer, who must on the back of his warrant as sergeant, certify that he does thereby appoint him to be clerk of the company. He must also be sworn to the faithful discharge of his duty.[1] *St.* 1809, *c.* 108, § 8, 35. [Revised Stat. *c.* 12, § 66.]

The complainant produced before the justice no evidence of his appointment. It does not appear that his motion to amend was granted, nor indeed could it be. There was no certificate of his appointment which could be amended. The certificate of the oath did not refer to the office of clerk, and it was clearly inadmissible, in any stage of the proceedings, to permit the commanding officer of the company to make an appointment to enable the complainant to sustain a prosecution, which he had no authority to commence.

We are therefore of opinion, that both of the objections are well founded.

Proceedings quashed.

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[1] But see *Keen* v. *Meade*, 3 Peters's Sup. Ct. R. 7, where it is said by *Thompson* J., that it may well be questioned whether the middle letter formed any part of the Christian name. See also Co. Lit. 3 *a*; *Rex* v. *Newman*, 1 Ld. Raym. 563; *Franklin* v. *Tulmadge*, 5 Johns. R. 84; *Reid* v. *Lord*, 4 Johns. R. 119, note *a*; *Wood* v. *Fletcher*, 3 N. Hamp. R. 61; *Arbouin* v. *Willoughby*, 1 Marshall, 477; *Hutchins* v. *Gilbie*, 2 Chitty's R. 335.

[1] See *Commonwealth* v. *Dedham*, 16 Mass. R. 141; *Sherman* v. *Needham*, 4 Pick. 66; *Commonwealth* v. *Sherman*, 5 Pick. 239; *Bassett* v. *Marshall*, 9 Mass. R. 312.

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BENJAMIN A. WEBBER, Petitioner, &c.

A person subject to militia duty, living within the limits of one brigade, cannot lawfully enlist in a volunteer company in another brigade.

WEBBER was fined by a justice of the peace for neglecting to muster in a standing company of militia in Bedford on the 3d of May, 1825; and now, upon his petition for a writ of *certiorari*, it appeared, that when he was enrolled and warned, he lived in Bedford, which is within the limits of the *second* brigade of the third division, and was justly fined, unless the following facts constitute a defence. Previously to the time of the notification, he had been enrolled in a company of artillery in Lexington, which is within the limits of the *first* brigade of the same division, and was doing duty in it. This
265 company was raised as early as 1785, and the officers first commissioned were authorized by their commissions to command "the company of matrosses in the brigade in the county of Middlesex;" there being then but one brigade in the county. As early as 1790, the militia of the county were formed into two brigades constituting the third division, and the tenor of the commissions was altered accordingly. For the last twenty-five years, at least, there have been some members of this company, who at the time lived within the limits of the second brigade, doing duty in this company, and no legal or official complaint had ever been made before the one in this case.

Oct. 14th. *Hoar*, for the petitioner, cited *Commonwealth* v. *Walker*, 4 Mass. R. 556; *Commonwealth* v. *Clark*, 11 Mass. R. 239.

Locke, *contrà*, relied on *Commonwealth* v. *Cummings*, 16 Mass. R. 194.

Oct. 17th. MORTON J. delivered the opinion of the Court. The only question in this case is, whether a person liable to perform militia duty in one brigade, can legally enlist in an artillery company belonging to another.

In the fourth section of the militia law of the United States (2 *Cong.* 1 *Sess.* *c.* 33) it is enacted, "that each company of artillery and troop of horse shall be formed of volunteers from the brigade." This provision is explicit, and if it be incon-

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sistent with the statutes of this commonwealth, there can be no doubt which is paramount. But there is no such inconsistency. On the contrary, our statute not only adopts the principle, but extends it to all other voluntary corps, as well as to the artillery and cavalry. Upon it are founded many of the provisions relative to the organization and government of all companies raised by voluntary enlistment.

Unless enlistment into these companies be restricted to the limits of the brigade to which they belong, they can be subject to no restriction other than the bounds of the commonwealth.

Volunteer companies are in a measure placed under the immediate superintendence and direction of the brigadier general. By the section of the United States statute above cited, he is authorized to determine their uniform. By the 16th section of our militia law (*St.* 1809, *c.* 108,)[1] all companies raised at large and not annexed to any particular regiment, are subject to the orders of the commander of the brigade in which they have been raised. By the 15th article of the 34th section of the same statute,[2] the commander of the brigade is authorized, upon the application of the commanding officer of any volunteer company, to discharge any member thereof; who thereupon will be liable to be enrolled in the standing company within whose limits he may reside. The commander of the brigade may also discharge any person improperly enlisted in a volunteer corps, upon the application of the commanding officer of the standing company to which such person belonged. *Ex parte Gallup*, 1 Pick. 464

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These principles were well considered by the Court in the case of *Commonwealth* v. *Cummings*, 16 Mass. R. 194. The doctrine laid down in that case is admitted to be decisive of the question under consideration; but it is said by the petitioner's counsel, to be inconsistent with the decision in the case of *Commonwealth* v. *Walker*, 4 Mass. R. 556; and we are therefore called upon to revise it.

Although some of the *dicta* or rather intimations of *Parsons* C. J., in delivering the opinion of the Court in *Commonwealth*

[1] See Revised Stat. *c.* 12, § 15, 16.

[2] Revised Stat. *c.* 12, § 19.

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Webber, Petitioner, &c

v. *Walker*, may not be easily reconciled with the principle established in *Commonwealth* v. *Cummings*, yet the decisions themselves do not clash. In the former it was holden, that the enlistment of a private of a standing company of not more than sixty-four effective privates, into a voluntary corps, is not void, but exempts such private from duty in the standing company, until he shall be discharged by the brigadier general from the voluntary corps. In the latter it was holden, that a member of a voluntary corps, by removing from the brigade to which it belongs, renders himself liable to enrolment in the standing company into which he may remove. The reason of the former decision is, "that the privates of the standing companies do not keep the rolls, nor can they be presumed to be conusant of the number of men borne on them." This does not apply to the latter case; for privates, as well as officers, may be presumed to know the limits and extent of the brigade to which they belong, as well as of the regiment and company in which they perform military service. We are therefore of opinion, not only that the latter case is founded upon the true construction of the several statutes on this subject, but that the two adjudications may well stand together.

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The enlistment of the petitioner into the artillery company was illegal, and he incurred the penalty provided by law for his neglect to perform duty in the standing company within whose limits he resided.

Petitioner took nothing by his petition.[1]

[1] A removal from the limits of one regiment into those of another within the same brigade, does not dissolve an enlistment of a soldier in a volunteer company of militia within the regiment from which he removed. *Munyan* v. *Coburn*, 8 Pick. 431

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NOAH SHATTUCK *versus* SAMPSON WOODS.

Where each party files his exceptions to the direction of the Court of Common Pleas, and the exceptions are overruled and the judgment affirmed, each is entitled to his costs.

DEBT. The declaration contained two counts, and in the Court of Common Pleas a verdict was returned on one for the plaintiff and on the other for the defendant. Each party filed his exceptions to the direction of the judge, but the plaintiff alone entered the action in this Court. Each party failed to support his exceptions and the judgment of the court below on both counts was affirmed. [See 1 Pick. 171.] And now the Court held that each party was entitled to recover his costs. *Oct. 1825.*

TYLER BIGELOW *versus* The Inhabitants of WESTON

owns are liable to an individual, under *St.* 1786, *c.* 81, § 7, [See Revised Stat. *c.* 25, § 22,] for an injury occasioned by an incumbrance in the road, (as by large stones being left in it,) as well as for one occasioned by any defect in the road.

THIS was an action on the case, founded upon *St.* 1786, c. 81, § 7, to recover double damages for an injury sustained by the plaintiff in having his chaise overturned and broken, 268
by reason of a certain highway in Weston being suffered to be out of repair and incumbered and obstructed by several large stones placed and left upon it.

The statute provides, that if any person shall receive any injury "through any defect or want of necessary repair and amendment of any highway," &c., he may recover of the county, town, &c., who are by law obliged to keep it in repair, in case they had reasonable notice of the defect, double the damages thereby sustained.

On the trial in the Court of Common Pleas, upon the general issue, it appeared that a small wooden bridge in Weston being supposed to require rebuilding, the selectmen determined to rebuild it with stone, and entered into a contract with one

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Bigelow v. Weston.

Converse Bigelow for furnishing the stone and rebuilding the bridge. This agent procured several large stones to cover the bridge, which he placed at each side of it as far out of the travelled path as they could be without being exposed to fall from the causeway, which there formed the road. The stones thus placed left only eleven feet and a half in breadth for carriages to pass between them, and as the plaintiff was passing in his chaise early in the evening, his horse sheared from the stone placed on the right hand side of the bridge, and ran over another on the left, by which his chaise was overturned and broken.

The defendants contended, that by the statute they were liable for such injuries only as arose from neglect to repair the roads, or from the decay of the roads or bridges. But *Strong* J. instructed the jury, that they were liable for injuries occasioned by stones or other obstructions or incumbrances laid or suffered to remain in and upon such roads.

The jury found a verdict for the plaintiff, and the defendants thereupon filed their exceptions to this direction.

Oct. 13*th.* *Stearns* now insisted upon the distinction taken below, between a defect and an incumbrance, remarking that a cart left in the road would be an incumbrance, as much as a stone, yet it would not subject the town to a prosecution. In England an individual is often obliged to keep a road in repair; but if he

269 should be indicted for suffering an incumbrance, and it should only appear that the road was out of repair, or *vice versâ*, the proof would not support the indictment. A town is liable for negligence only, but this accident was occasioned by a laudable precaution on the part of the defendants.

Hoar, *contrà*, admitted that a town might take up a bridge and carry materials to the place to rebuild it, and leave them in the road so long as should be necessary for that purpose,[1] but he said this action was brought because these stones had been left in the road an unreasonable length of time.

Oct. 17*th.* *Per Curiam.* By the statute, towns are bound to keep in repair and amend highways, &c., so that they may be safe and convenient for travellers, and are liable for an injury to any

[1] See *Commonwealth* v. *Passmore*, 1 Serg. & Rawle, 219; 3 Chitty's Crim. Law, (3d Amer. ed.) 607 notes

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person occasioned through any defect or want of necessary repair and amendment. It is said that want of repair can apply only to some defect in the road, such as is caused by travelling, and not to an obstruction; but it is difficult to make the distinction. Trees may fall across a road without the agency of any individual. It should seem that the town, upon proper notice, is as much bound to remove them as to repair any defect.[2] The exceptions therefore are not well taken.

Judgment affirmed.

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[2] By the Revised Statutes, any person who is injured in his person or property by reason of any defect or want of repair, which has existed for twenty-four hours, in any highway, town-way, causeway, or bridge, may recover the amount of damage sustained thereby; if the person or body liable had reasonable notice of the defect or want of repair, the party injured may recover double damages. Revised Stat. *c.* 25, § 22. A town becomes responsible for an injury occasioned by a defect in a highway, from the time when the way is opened for public travel. *Bliss* v. *Deerfield*, 13 Pick. 102.

A way is sufficiently shown to be a highway, by proof that it has been known and used as a highway for forty years, and during that time has been repaired by the town in which it is situated. *Reed* v. *Northfield*, 13 Pick. 94. See *Canday* v. *Lambert*, 2 Root, 173. Ten years user of a way by the inhabitants of a town, is not sufficient to oblige them to keep it in repair. *Estes* v. *Troy*, 5 Greenl. 368. But it seems a user of twenty years, and perhaps a shorter period, would impose such obligation *Todd* v. *Rome*, 2 Greenl. 55. See *Hinckley* v. *Hastings*, 2 Pick. (2d ed.) 164, notes; 3 Chitty's Crim. Law, (3d Amer. ed.) 566, n. (A.)

What is reasonable notice to a town, of the existence of a nuisance in the highway, is a question of law. *Springer* v. *Bowdoinham*, 7 Greenl. 442. Notice to a town, of a defect in a highway, may be presumed from the notoriety of the defect, and its continuance for such a length of time, that the proper officers of the town, with due vigilance and care, might have known of it. *Reed* v. *Northfield*, *ubi supra*.

The fact that a person injured through a defect in a highway had previous knowledge of the defect, is not conclusive evidence of negligence on his part, id. Yet towns are not liable for injuries which occur on highways, though they are so low as to be overflowed, if it was imprudent to pass them in such a condition, or if they were passed unskilfully. *Farnum* v. *Concord*, 2 N Hamp. R. 392.

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STEPHEN COOK *versus* WILLIAM HULL.

The owner of land bordering on a stream has no right to divert the water for the purposes of irrigation, and thereby diminish the quantity which has been accustomed to flow to a mill of forty years' standing, so as to impede its operation.

CASE for diverting water from the plaintiff's mill. Trial before *Putnam* J. upon the general issue.

It appeared that the plaintiff's mill is about two miles below a mill seat owned by the defendant, and upon the same stream. The plaintiff's mill was originally occupied for a grist-mill. That was taken away about ten years ago, and a woollen manufactory has been built in its place. The plaintiff's water-course and mill seat had been used, by him and his ancestors, for more than forty years next before the diversion for which the action was brought. The defendant owned an ancient malt mill and dam. There were two outlets for the water from this dam, one of which, on the westerly side, suffered the water to pass into an ancient channel, about twenty rods in length, and after irrigating a small tract of ground belonging to the defendant, to unite with the stream running to the plaintiff's mill. The plaintiff complained of a diversion of the water by reason of a new channel which the defendant cut in 1817, from three to five feet in width, leading from the ancient one and passing through a hill of sand, which was excavated to make a passage for it, and thence extending round the margin of a large tract of plain land belonging to the defendant, from which new channel the defendant cut small ditches into and across the plain land for the purpose of irrigation. The land was so porous that the water would not reach the end of the ditches, but would be absorbed. When the gate leading from the ancient channel into the new one was kept shut, there was water enough at the plaintiff's mill; but when it was open, the water failed, so that the machinery could not be made to work

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The counsel for the defendant contended that he had a right to conduct the water from his ancient channel, and use it in the manner before stated; but the judge was of a different opinion, and so instructed the jury. He stated to them that

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the peaceable and exclusive use of the water-course under a claim of right, for more than twenty years, unexplained, was conclusive evidence of a right in the party so enjoying it; and that the defendant turned the water into the new channel after the plaintiff's right had been long established to have all the water, except what the defendant had appropriated to his own use before the cutting of the new channel.

The jury found a verdict for the plaintiff, and the defendant moved for a new trial on the ground of a misdirection.

Oct. 12th.

Stearns and *T. Bigelow*, for the defendant, cited *Weston* v. *Alden*, 8 Mass. R. 136; 3 Dane's Abr. 16; *Thurston* v. *Hancock*, 12 Mass. R. 220.

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Hoar, *contrà*, cited *Colburn* v. *Richards*, 13 Mass. R. 420; *Brown* v. *Best*, 1 Wils. 175; *Bealey* v. *Shaw*, 6 East, 208.

The opinion of the Court was read as drawn up by

April term 1826.

PARKER C. J. There can be no doubt that the verdict is right in principle. The plaintiff had enjoyed the use of water for the purpose of driving his mill, for more than forty years. The defendant had enjoyed the use of the same stream after it left his own mill, situated above the plaintiff's mill, for the purpose of irrigating his lands; but in 1817, to increase the privilege for the benefit of his lands, he took the water from its usual channel by means of a ditch, which conveyed it so far through his lands as by absorption and evaporation to diminish the quantity, which before that time came to the plaintiff's mill, so materially as to injure and stop his works. The right to do this is claimed by the defendant as resulting from the decision of this Court in the case of *Weston* v. *Alden*. There is a material difference between that case and the one before us. The plaintiff Weston had not erected any mill; the injury complained of was only that less water came through his land than used to flow before the defendant made his sluices, and the damage complained of was only the natural consequence of the lawful use of the water by the defendant. It did not appear that the plaintiff or those before him in the estate, had erected any works of art upon the stream, or had appropriated the water running through his land by any artificial means. Whereas in the case before us the plaintiff, and those

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whose estate he holds, had erected and maintained mills at great expense, and they could be profitably used only by enjoying the customary flow of water, and this use had been acquiesced in by the defendant, and those who preceded him in his estate, for more than forty years.[1]

The plaintiff's counsel in this case seemed to admit, that if the case of *Weston* v. *Alden* is law, they had no right of action, and relied upon the case of *Colburn* v. *Richards* as having overruled it; but we do not consider this latter case in that light. The circumstances were materially different, particularly in this, that in the case of *Colburn* v. *Richards*, the defendant, who was sued for removing the dam, had a grist-mill which had stood fifty years, the working of which was impeded by the measures taken to irrigate his land. The two cases may well stand together, and the latter of the two governs the case now before us

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Judgment according to the verdict.[1]

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[1] See 3 Kent's Comm. (2d ed.) 441 to 454; *Tyler* v. *Wilkinson*, 4 Mason, 397; *Haight* v. *Morris Aqueduct*, 4 Wash. C. C. R. 601; *Cooper* v. *Smith*, 9 Serg. & Rawle, 26; *Butz* v. *Ihrie*, 1 Rawle, 218; *Hepburn* v. *M'Dowell*, 17 Serg & Rawle, 383; *Smith* v. *Smith*, 4 Halsted, 140; *Ingraham* v. *Hutchinson*, 2 Connect. R. 584; *Gleason* v. *Gary*, 4 Connect. R. 418; *Manning* v. *Smith*, 6 Connect. R. 289; *Sherwood* v. *Burr*, 4 Day, 244; *Reid* v. *Gifford*, 1 Hopkins's Ch. R. 416; *Stiles* v. *Hooker*, 7 Cowen, 266; *Mitchell* v. *Walker*, 2 Aiken, 266; *Russell* v. *Scott*, 9 Cowen, 279; Matthews on Presumptions, *ch.* 16, § 10; *Ricard* v. *Williams*, 7 Wheat. 59; *King* v. *Tiffany*, 9 Connect. R. 162; *Twiss* v. *Baldwin*, 9 Connect. R. 291; *Mason* v. *Hill*, 2 Neville & Man. 747; *S. C.* 5 Barn. & Adol. 1; *Canham* v. *Fiske*, 2 Crompt. & Jerv. 126; *S. C.* 2 Tyrwh. 155. Whether aquatic rights are acquired by mere prior occupancy not continued for twenty years, *quære*. *Blanchard* v. *Baker*, 8 Greenl. 253. See also *King* v. *Tiffany*, *ubi supra*, *Platt* v. *Johnson*, 15 Johns. R. 213; *Merritt* v. *Brinkerhoff*, 17 Johns. R. 306; *Ingraham* v. *Hutchinson*, *ubi supra*.

[1] See *Runnels* v. *Bullen*, 2 N. Hamp. R. 532; *Tyler* v. *Wilkinson*, 4 Mason, 397; *Thompson* v. *Crocker*, 9 Pick. 59; *Blanchard* v. *Baker*, 8 Greenl. 253; *Merritt* v. *Brinkerhoff*, 17 Johns. R. 306; *Van Bergen* v. *Van Bergen*, 3 Johns. Ch. R. 282; *Beissell* v. *Sholl*, 4 Dallas, 211; *Palmer* v. *Mulligan*, 3 Caines's R. 307; *Merritt* v. *Parker*, 1 Coxe's (New Jers.) R. 460; *Coalter* v. *Hunter*, 4 Randolph, 58; *Hutchinson* v. *Coleman*, 5 Halsted, 74; *Barron* v. *Baltimore*, 2 Amer. Jurist, 203; *Hammond* v. *Fuller*, 1 Paige, 197; *Cooper* v. *Williams*, 4 Ohio R. 286; *Cooper* v. *Hall*, 5 Ohio R. 322; *Haynes* v. *Gault*, 1 M'Cord, 543; *Williams* v. *Gale*, 3 Harr. & Johns. 231; *Strickler* v. *Todd*, 10 Serg. & Rawle, 63; *Williams* v. *Morland*, 2 Barn. & Cressw. 910; *S. C.* 4 Dowl. & Ryl. 583;

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ABIGAIL CUTLER *versus* REBECCA TUFTS.

J. C. having inherited one fourth part of certain land which had been set off to the widow of W. C. for her dower, and having purchased of T. G. in 1798, for 700 dollars, two other fourths, conveys to J. T., in 1799, for 350 dollars, "one half of all that part of the real estate of W. C. which was set off to the widow, which was conveyed to me by T. G., reference to his deed being had, meaning to convey by this instrument the full one half of the above described estate as the same is now in common and undivided;" and in 1811, he releases to J. T. all his right in the rest of the dower land. In 1817, J. T. reconveys to J. C. an "undivided moiety of certain real estate, the same being a part of the real estate of W. C. and set off as dower, &c., *meaning hereby to reconvey to J. C. the same premises that J. C. conveyed to me in* 1811." *It seems*, that one half of the dower land passed by the first deed of J. C. to J. T.; but it was *held*, that if only a fourth passed, yet that J. T.'s deed to J. C. passed a moiety of the dower land, either according to the intention of the parties, or if not, because the clause above italicized was not a reservation, exception, or explanation of the preceding words of grant, but was repugnant to them and therefore void.

UPON a case stated, it appeared that this action was brought to recover 50 dollars, received by the defendant for rent of part of certain land, the whole of which had been set off to the widow of one William Cutler for her dower. The facts will be found in the opinion of the Court. If the Court should determine that one half of the dower land passed by the deed hereafter mentioned of John Tufts to James Cutler, the defendant was to be defaulted; but if they should determine that only one quarter passed, the plaintiff was to become nonsuit.

The case was briefly spoken to at this term, and afterwards argued in writing by *Stearns* and *Russell* for the plaintiff, and *Hoar* for the defendant.

For the *plaintiff* were cited, *Adams* v. *Frothingham*, 3 Mass. R. 361; *Worthington* v. *Hylyer*, 4 Mass. R. 205; Shep Touch. 87, 88, *rules* 5, 7; *Thomas* v. *Howell*, 4 Mod. 69; Vin. Abr. *Grants*, (*H. a.* 10) *pl.* 4, and (*H.* 13)

Wright v. *Howard*, 1 Sim. & Stu. 190; *Mason* v. *Hill*, 3 Barn. & Adol. 304; *S. C.* 2 Neville & Man. 747; *S. C.* 5 Barn. & Adol. 1.

In an action of the case for diverting a water-course, if the unlawful diversion be proved, the plaintiff is entitled to recover without proof of actual damage. *Blanchard* v. *Baker*, *ubi supra*. But see *Thompson* v. *Crocker*, and *Cooper* v. *Hall*, *ubi supra*; *Harrison* v. *Sterret*, 4 Harr. & M'Hen. 540.

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pl. 25 ; 1 Wood's Conv. (Dubl. ed. 1792, 8*vo.*) 328, 330 ; *Sherley* v. *Wood*, Hob. 72 ; *Stukeley* v. *Butler*, ibid. 170 ; Com. Dig. *Fait*, *E*, 7, cites 2 Roll. Abr. 455, *l.* 1 and 5 ; Bac. Abr. *Grants*, *I*, 1, cites Mo. 881.

For the *defendant*, Shep. Touch. 78, (and note citing Cro Eliz. 6,) 86, 87 ; *Wiltshire* v. *James*, Dyer, 59 *a* ; Bac. Abr. *Grants*, *I*, 1, cites Mo. 880 ; *Whitman* v. *Hapgood*, 10 Mass. R. 439.

The opinion of the Court was read as drawn up by

April term 1826, at Concord.

PARKER C. J. There is considerable difficulty in ascertaining the true intent of the parties to the conveyance made by John Tufts to James Cutler in 1817, without resorting to technical rules of construction, which may or may not be conformable to that intention. The ambiguity is not of a nature to be explained or removed by extrinsic evidence of what the parties intended, for it exists in the deed itself; and so the difficulty must be solved by a judicial construction of the instrument itself, in connexion with other instruments to which it refers, and having regard to the state of the title between the parties as it may appear from deeds between the same parties.

By the deed first mentioned John Tufts conveyed to James Cutler "all his right and title and interest in and to one undivided moiety or half part of certain real estate situate in the towns of West Cambridge, Lexington and Cambridge, the same being a part of the real estate of the late William Cutler deceased, and set off as dower to the widow Rebecca Cutler." Had the description ended here, no question could have arisen which could not have been settled by recurring to the records of the probate office and ascertaining from thence what portion of the estate of William Cutler had been assigned to the widow for her dower by metes and bounds. *That* is the subject matter of the conveyance, and if Tufts had title therein, one undivided moiety thereof passed by the deed to J. Cutler. But a clause is added, which has produced the controversy, viz. "meaning hereby to *reconvey* to the said James Cutler

274 the same premises, with their appurtenances, that the said Cutler conveyed to me by his deed dated September 26, 1811." In order to raise the ambiguity it is assumed, that by this last

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deed Cutler conveyed to Tufts a fourth part only of the dower land, so that the deed of Tufts, if it passed only what was conveyed by the deed of Cutler, passed only half of that moiety, or an undivided fourth part of the land in question. If this was really what was intended by Tufts in his deed to Cutler, it is remarkable that he should by words convey an undivided moiety, instead of a fourth part, which might have been done quite as conveniently, leaving no ambiguity to quarrel about. And I do not see any great difficulty in so construing the whole of the deed as to give a sensible construction to the supposed restrictive clause, without impairing the effect of the preceding description of the grant. James Cutler inherited one fourth part of the dower land from his father William Cutler. He had purchased one moiety of the same land, which had descended to his eldest brother William, and had been conveyed by him to Thomas Goddard. On the 31st of March, 1798, Goddard conveyed this moiety to James Cutler for the consideration of *seven hundred* dollars. The other fourth part had descended to Rebecca Tufts the defendant, widow of John Tufts, formerly Rebecca Cutler, the plaintiff's sister. At the time of this last conveyance and until the 25th of March, 1799, James Cutler was the owner of three fourth parts, and John Tufts, in right of his wife, of one fourth part. On the last mentioned day, James Cutler, in consideration of *three hundred and fifty* dollars, made his deed of release and quitclaim unto John Tufts, in fee, of "*one half* of all that part of the real estate of William Cutler late of Cambridge deceased, which was set off to the widow for her dower or thirds in said deceased's estate, quantity and quality, *which was conveyed to me by Thomas Goddard*, as by his deed bearing date the 31st of March, 1798, reference thereto being had, all which will more fully appear, meaning to convey by this instrument the full one half of the afore-described *estate* as the same is now in common and undivided." On the 26th of September, 1811, James Cutler released to John Tufts all his right, title and interest in the estate in question, 275
with other land. By virtue of these several conveyances, on the day of the execution of this last deed John Tufts became seised of the whole of the land, three fourths by purchase of

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James Cutler, in his own right, and the other fourth part in right of his wife.

It may be doubted whether by the deed of the 25th of March, 1799, Cutler intended to convey the whole moiety which he had purchased of Goddard; the consideration expressed is just one half of the consideration of his purchase from Goddard. He conveys "the full one half of all that part of the real estate &c. which was set off to the widow, &c., quantity and quality, *which was conveyed* to me by T. Goddard, &c., meaning to convey by this instrument the full one half of the *afore-described estate* as the same is now in common and undivided." The full one half of what estate? Probably one half of the estate which he had purchased from Goddard was intended, for he had received one half of the price. It might perhaps be difficult to establish this construction in favor of Cutler, in a contest between him and Tufts respecting the effect of this deed, and it is now immaterial, except from its bearing on the construction of the deed now in controversy; for whether this conveyance left Cutler the owner of a moiety or a fourth part, the whole of his title passed from him on the execution of the deed of the 26th of September, 1811, he by that deed selling all his right and title, without mentioning the proportion then intended to be conveyed. Tufts remained thus seised of the whole until 1817, when by deed of that date he released all his right to Cutler "in, to and of *one undivided moiety* or half part of certain real estate situate in the towns of West Cambridge, Lexington and Cambridge, the same being a part of the real estate of the late William Cutler deceased, and set off as dower to the widow Rebecca Cutler."

This is explicit and unambiguous, and by the terms of the deed thus far, there could be no question that Tufts meant to convey one undivided moiety of the estate which had been the subject of all these conveyances.

Then comes the clause which has created the difficulty, viz. "meaning hereby to *reconvey* to the said James Cutler
276 the same premises with their appurtenances, that the said Cutler conveyed to me by his deed dated September 26, 1811."

Without going to the question of repugnancy between this

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clause and the one immediately preceding, which being a mere technical rule might force upon us a construction different from the intent of the parties and therefore ought not to be acted upon but in the last resort, I think, upon the broad rule of construction of instruments, viz. the intention of the parties,[1] the case is stronger for the plaintiff than the defendant; and therefore, as the words of the deed are to be taken as the grantor's words, if there be an ambiguity, it should be construed against him and in favor of the grantee.

He means, he says, to reconvey the same premises that Cutler conveyed to him by his deed dated the 26th of September, 1811. What was conveyed by that deed? This is doubtful in respect to the dower land, for the reasons above stated, and for the further reason, that the consideration of this conveyance was large enough for an entire moiety of the land, whereas the consideration of the deed of March 1799, was just one half of the sum which Cutler had given a short time before for the whole moiety.

These facts, though not decisive of the construction of the two deeds, yet furnish strong ground to believe, that the parties understood that the first deed had conveyed but a moiety of the moiety purchased of Goddard, and that the deed of the 26th of September, 1811, conveyed a full moiety; and that it was for this reason that reference was made in this deed of Tufts to Cutler to that last mentioned deed; and if it were not so, it is unaccountable that Tufts, intending to sell only a fourth, should have expressly sold a *moiety* of the dower land. That the parties were not very precise in their reference to the deed, appears from another circumstance. Tufts says, "meaning hereby to *reconvey* the same premises which said Cutler had conveyed by his deed," &c. Now if full operation should be given to the explanation, as it is called, the other land conveyed by Cutler to Tufts by that deed would pass as well as the dower land, and yet it was manifestly the intention of 277
Tufts to convey only the dower land. Taking the whole of the deed together into a view, with reference to the former

[1] As to the force of intention in the construction of deeds, see *Ingell* v. *Nooney*, 2 Pick. (2nd ed.) 366, notes.

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deeds and the state of the title between the parties, it would be far from a strained construction, to make the deed from Tufts to Cutler convey a complete moiety, without resorting to the repugnancy between the two clauses.

But supposing this construction to be doubtful, and that the two clauses cannot stand together consistently, so that the meaning of the parties may be fairly drawn from them, we are nevertheless all very clearly of opinion that the plaintiff ought to recover. The words of the deed descriptive of the interest intended to be conveyed, are wholly without ambiguity. The grantor releases "all his right, title and interest in, to and of *one undivided moiety* of certain land, situated &c., the same being a part of the real estate of, &c., and set off as dower to the widow Rebecca Cutler." The succeeding clause, by reference to another deed and by implication only, would reduce this moiety to a fourth part. Is this not repugnant? Is it not the same as if the grantor had said, I sell one undivided moiety, meaning hereby to sell one undivided fourth part? And if it is so, then most clearly, by reason as well as by the authorities, the latter clause ought to be rejected.[1] It is not an explanation, but a direct contradiction. The words cannot stand together, and the grantor shall not have the benefit of such an unjust interpretation of words which he has himself introduced into the instrument, as would give him the right to destroy his own grant. This point has been well argued by counsel exceedingly well qualified to manage a technical combat of this nature. It is admitted by the counsel for the defendant, that if this second clause is repugnant to the first, it must be rejected, and therefore he has attempted to consider it as amounting to an exception of a part of what was granted, or an explanation of the preceding clauses; but we are unable to find any thing but a flat contradiction

An exception, says Lord *Coke*, 1 Inst. 47 *a*, is ever of part of the thing granted and of a thing *in esse*, as an acre out of a
278 manor; that is, out of a *general* a part may be excepted, but not part of a certainty, as out of twenty acres, one. Now in the case before us the thing granted is certain, that is, a

[1] *Sprague* v. *Snow*, 4 Pick. 54. See *Payne* v. *Parker*, 1 Fairfield, 178.

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moiety of a certain tract of land; an exception therefore of one half this moiety would be like a grant of twenty acres excepting one. It is not a *reservation*, for that must be of some new right not *in esse* before the grant, as of rent &c., or perhaps of some preëxisting easement. But it is said, it is an *explanation* of the preceding clause, and as such may limit and restrain the effect of the foregoing words; and an example from Moore, 880, is cited in proof of this position. The general position laid down in that case is, that if a thing be granted generally and then comes a *videlicet* which destroys the grant, it is void, being repugnant to the thing first granted; as if there be a demise of a parsonage, with the lands and woods, except the woods, the exception is void, because repugnant, though if woods had not been mentioned before, the exception would be good, because then there is no repugnancy. But the passage cited and relied upon by the defendant's counsel is this, — if the *videlicet* or proviso be *only explanatory* and not repugnant to the grant, it will be good; — and as an example it is stated, that if an advowson be granted, *viz.* to present every second term, this is good; the *videlicet* being only explanatory. This case has certainly the appearance of favoring the defendant's position, as it is stated in Bacon's Abridgment, and in the argument. Upon examining the case itself however in Moore, the difficulty is removed; for it turns out to be a case put *arguendo* by one of the judges, and expressly denied to be law by *Hobart* C. J. and *Winch* J. The same case is more fully reported in Hobart, 168, and the opinion of Lord Chief Justice *Hobart*, is therein stated at large; in which he considers the legal effect of *videlicets*, provisos, *habenda* &c., and he lays it down as a general proposition, that though these several forms of expression may explain doubtful clauses precedent, and may serve to separate and distribute generals into particulars, yet that they can never be suffered to restrain or diminish what is expressly granted; if they can be construed to have no other meaning, they are void for repugnancy.

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It is worthy of remark, that in a work so generally correct as Bacon's Abridgment, the case of the advowson, as put by one of the judges in the case of *Stukely* v. *Butler*, should be stated as law, when in the very authority he cites for the posi-

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tion it is expressly denied to be law by one half of the court, comprehending in that half the very eminent Lord Chief Justice *Hobart*; and it is also remarkable that he should have cited Moore only, when the same case is reported in 2 Roll. Abr. 50, *pl.* 7, and much more extensively in Hobart's Reports.

For the reasons given in this opinion, and particularly because of the repugnancy of the clause relied upon by the defendant to the clear and explicit grant contained in the preceding clause, we are all of opinion that the plaintiff ought to recover. The defendant must therefore be defaulted.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF PLYMOUTH, BARNSTABLE, BRISTOL AND DUKES-COUNTY, OCTOBER TERM 1825, AT PLYMOUTH.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, } JUSTICES.
HON. SAMUEL S. WILDE, }

CHLOE DAGGETT, Petitioner &c.

Petition by prochein ami of an infant feme covert for the sale of real estate granted, and the proceeds ordered to be secured for her benefit.

Warren presented the petition of Chloe Daggett as *next friend* of Chloe Carpenter, her daughter, a married woman under twenty-one years of age, for the sale of real estate belonging to the minor, representing that it would be for her benefit that the estate should be sold and the proceeds applied to her use. He stated, that the mother had been guardian of record, but he presumed the guardianship was terminated by the marriage, and that the husband would give a release to the purchaser. The *Court* (*Parker* C. J. and *Wilde* J. alone

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Daggett, Petitioner &c.

being present) granted the petition, observing that the proceeds must be secured for the benefit of the wife.[1]

281 COMMONWEALTH *versus* BENJAMIN BOLKOM

On an indictment against an innholder, the minutes of the Court of Sessions, of a license having been granted him to keep an inn, are admissible evidence to prove that fact, no extended record of the granting of such licenses being kept by the court.

Where such a license has been granted, it will be presumed that the court had proper evidence before them, as the recommendation of the selectmen, &c.

An indictment against an innholder for suffering persons "to play at cards and other unlawful games," is sufficiently certain, the word *cards* being used in the statute as the name of a game, and the words "other unlawful games" being surplusage.

In such indictment it is not sufficient to allege, that the defendant was duly licensed and that he allowed persons to play in his inn, but it must be directly averred that he actually kept an inn.

THIS was an indictment upon *St.* 1798, *c.* 20. [See Revised Stat. *c.* 47, § 9.] There were two counts. The first alleged, that on, &c., at Attleborough, in the county of Bristol, the defendant, "being then a person there licensed as an innholder according to law, &c., did unlawfully &c. suffer and allow sundry persons &c. to play at cards and other unlawful games in the dwellinghouse of him the said Bolkom, occupied and improved by him, being the same dwellinghouse in which he was licensed to keep his inn as aforesaid," &c. The second count contained an averment that the defendant was a licensed innholder, and alleged that he "unlawfully &c. did allow a great number of persons &c. to play in his inn at cards and keeno table for money."

Upon the trial the attorney-general, to prove that the defendant was duly licensed as an innholder, offered in evidence a book purporting to be the book of records of the Court of Sessions of the county of Bristol, and kept by the clerk of that court, in which, under the head of "Licenses Sep-

[1] A *feme covert* need not sue by *prochein ami* for maintenance. *Knight* v *Knight*, 1 Taylor, 120.

If a *feme covert* improperly sues alone, advantage must be taken of the mistake by a plea in abatement. *Newton* v. *Robinson*, 1 Taylor, 72.

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'ember term 1823," was entered the name of the defendant, with the names of his sureties in the recognisance required by law. The defendant objected to this evidence, until it were proved by record evidence or otherwise, that the defendant had previously been approved of by the selectmen, or otherwise, upon their unreasonable refusal to give their approbation, had made application for a license. This objection was overruled. The defendant then objected to the sufficiency of the record, 282
because it did not set forth in full that the court had licensed him, but merely contained his name in the manner before stated. The clerk testified that the book produced was the only book of records of the Court of Sessions since 1814; that the entry of the license to the defendant was made in the usual and only manner in which licenses are recorded, and that the entry so made was the record of a license being granted to the defendant, and that he entered into the recognisance required by law with those persons as sureties whose names were so entered with the name of the defendant. The book was admitted in evidence and the defendant was convicted upon a general verdict, the objections made by him being reserved for the consideration of the whole Court. A motion also was made in arrest of judgment for defects in the indictment.

The cause was argued on the 15th of November, by *W. Baylies* and *Darling* for the defendant, and *Morton* (Attorney-General) for the commonwealth, and was determined on the 17th.

The counsel for the defendant insisted upon the objections taken at the trial, and observed that the Court of Sessions being a court of limited jurisdiction, every fact necessary to give it jurisdiction should be substantiated; *Williams* v. *Blunt*, 2 Mass. R. 213; that the government should prove that the defendant had been regularly licensed, otherwise he might be liable to two forfeitures, one as an innholder, the other for acting as such when he had not been licensed; *Clark* v. *Cushman*, 5 Mass. R. 507; that the book produced was unintelligible without the testimony of the clerk, and that parol evidence was inadmissible to explain a record.

But *per Curiam*. We see nothing in the statutes requiring a record in a technical sense. The judges of the Court of

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Commonwealth v. Bolkom.

Sessions, in licensing innholders, act merely as ministerial officers and not as a court of record, and their minutes are sufficient evidence.[1] The clerk's testimony was not necessary, except to prove that the book contained their minutes, and what he said in addition would not prejudice the defendant.

283 It is objected that it does not appear that the judges proceeded upon a certificate of the selectmen, &c.[1] It was not necessary that it should appear upon the record itself, and as in many other cases of limited jurisdiction, it is to be presumed, since the judges have granted the license, that they had proper evidence before them.*

Upon the motion in arrest of judgment it was objected, that the charge in the indictment, of suffering persons "to play at cards and other unlawful games," was too uncertain; that the particular game should have been specified. *Colborne* v. *Stockdale*, 1 Str. 495; *Rex* v *Popplewell*, ibid. 686; *Rex* v. *Mason*, 2 T. R. 581; *Davy* v. *Baker*, 4 Burr. 2471. But *per Curiam*, cards are considered as a game in the statute, and the words, "other unlawful games," may be rejected as surplusage.[2]

It was further objected, that the indictment ought to have alleged, not merely that the defendant was duly licensed, but that he acted as an innholder, and permitted gaming in the house occupied by him as an inn pursuant to the license. To this it was answered, that from the time when the license was granted all the duties of an innholder became obligatory on the defendant. But *per Curiam*. This objection is fatal. The whole averment in either count is, that the defendant was *duly licensed as an innholder*. Now this may be, and yet the defendant may have chosen, from change of circumstances or change of views, not to act under the license, and the mere fact of his having obtained a license does not necessarily prove or imply that he kept an inn. The statute of 1786, *c.* 68, provides, in the 14th section, that a removal from the place

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1 Stark. Evid. (5th Amer. ed.) 256, 257.

[1] Revised Stat. *c.* 47, § 23.

* See *Goff* v. *Fowler*, *post*, 300.

[2] See *Commonwealth* v. *Arnold*, 4 Pick. 251

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licensed shall supersede the license.[3] And there can be no doubt that if from any other cause the person licensed should choose not to avail himself of the license, he is at liberty to do so. It ought therefore to be directly alleged, in some form or other, that he was in the exercise of the employment of an innholder, to make him liable for the penalty sued for.[4] The indictment is bad in both counts, and the judgment must be arrested.

HUMPHREY DAVIS *et ux. versus* ROUNSEVILLE SPOONER. 284

Where a grantor of land having obtained possession surreptitiously of the deed, pretending that he would get it recorded, conveyed the land again to a person who had knowledge of the former conveyance, it was *held*, in an action by the heir of the first grantee against the second, that the demandant, having traced the deed into the hands of the grantor, might give parol evidence of its contents without calling him as a witness, though released by the tenant, to prove its loss, or showing that it was not in the register's office; and that not knowing who were the subscribing witnesses, he was not bound to prove their handwriting; and that the declarations of the second grantee previous to the second conveyance, were admissible to show such conveyance to be fraudulent.

Where a lost deed is not proved to have been destroyed, but only mislaid, it *seems* that the party should make affidavit that he has not been able to find it.

THIS was a writ of entry to recover certain land called "The White farm," and the demandants counted upon the seisin of Walter Spooner, to whom Alden Spooner, his father, had conveyed the land, and a descent to Mrs. Davis as the only child and heir of Walter, and upon an entry of the tenant after an abatement by Alden and a conveyance by him to the tenant.

The tenant pleaded, 1st, that Walter did not die seised; upon which issue was joined; and 2dly, that the tenant, at the time of the conveyance to him, did not know that Alden had previously conveyed the land to Walter; to which there was a replication that he did know of it; and thereupon issue was joined

The cause was tried before *Lincoln* J. On the part of the

[3] See Revised Stat. *c.* 47, § 17.
See *Commonwealth* v. *Arnold*, 4 Pick. 251

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demandants, one Haskell testified, that soon after Walter's death, which was in 1808, he went to see his widow, who was a sister of the witness; that she showed him two deeds purporting to be made by Alden to Walter, and to be attested by three subscribing witnesses and acknowledged before Seth Spooner, justice of the peace; that he read the deeds and proposed to take them and have them put on record, but she objected, saying her father Spooner would be offended, and that he delivered them back to her and had never seen them since. Upon cross-examination the witness said he did not remember the names of either of the subscribing witnesses, nor the date of the deeds.

285 Betsey Howard, who was the widow of Walter Spooner, having released to the demandants her right of dower, and being admitted as a witness, testified to some of the facts before stated, and that she objected to the proposition to have the deeds recorded, because, as she expected her father Spooner would administer on her husband's estate, she was afraid he would be offended if she meddled with the papers. On cross-examination she was asked, how she knew the papers were deeds from Alden to Walter. She answered that they looked like deeds; that she remembered there was written on the back of one of them, "Deed of the White farm from Alden Spooner to Walter Spooner," but she did not know when or by whom it was written; that she had no recollection of ever opening the papers, but only remembered the external appearance and the filing. She further testified, that a short time after her interview with her brother, Alden came to her house and asked permission to go to his son's desk, as there were papers there relating to his son's business as a deputy sheriff, which were wanted; that while he was at the desk he took up the deeds and said, "What, has not Walter got these deeds recorded," and then said he would take them and get them recorded; and that this was the last she ever saw of them.

The demandants again called Haskell to prove the handwriting of Alden in the execution of the deed, and to prove the contents of the deed. The tenant objected, that having proved that the supposed deed was in the hands of Alden,

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ney must call on him to produce it, or show that it had been lost or destroyed; that he was then in court, and was a competent witness for the demandants, if not objected to on the part of the tenant; and that resort could not be had to proof of the handwriting of the grantor, without first calling the subscribing witnesses, or proving that they were dead or out of the reach of process. These objections were overruled.

The demandants called several witnesses to the declarations of Alden before the conveyance to the tenant, that he had given the White farm to his son Walter. The tenant objected to this evidence, but the objection was overruled. To resist 286
this evidence the tenant called Alden, who testified that he never gave a deed to Walter

A verdict was returned in favor of the demandants, and the legal effect of all these objections on the part of the tenant was reserved for the consideration of the whole Court.

L. Williams for the tenant. The deed should have been *Nov. 15th.*
proved to be lost, and by the best evidence which the case would admit, before parol evidence of its contents was received. *The King* v. *Castleton*, 6 T. R. 236; *Jackson* v. *Hasbrouck*, 12 Johns. R. 192; *Jackson* v. *Frier*, 16 Johns. R. 193; *Little* v. *Lessee of Delancey*, 5 Binney, 267; *Jackson* v. *Todd*, 3 Johns. R. 300. The presumption was that it existed either in Alden's hands or in the register's office. The demandants should therefore have called upon Alden to produce it; and if he had said there was no deed in his hands, they should then have shown that they had made inquiry of the register. Alden had been released by the tenant, and his testimony used at a former trial; he was therefore a competent witness for the demandants, if the tenant did not object to him. For any thing that appears, the deed has been recorded and redelivered to the party entitled to it.

In regard to the subscribing witnesses, it does not follow that because Haskell did not know who they were, the demandants also were ignorant. They should have made an affidavit to that effect. *Blanton* v. *Miller*, 1 Haywood, 4; *Park* v. *Cochran*, ibid. 410.

Holmes and *W. Baylies*, *contrà*. The demandants were not at liberty to call Alden as a witness to testify to his own

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infamy. *Storer* v. *Batson*, 8 Mass. R. 440; 3 Dane's Abr. 296; *Rex* v. *Lewis*, 4 Esp. R. 225. But if he was a competent witness, they were not bound to make use of his testimony. *Bridge* v. *Eggleston*, 14 Mass. R. 249. Since however he was called by the tenant and testified that he never gave to his son a deed of the land in question, our neglect to call him amounts to nothing more than irregularity; which is not a ground for a new trial. As we did not know who were the subscribing witnesses, and were prevented from
287 knowing it by the misconduct of the grantor himself, who is identified with the tenant, we were not obliged to prove their handwriting. The acknowledgment of the party has frequently been considered as evidence of the execution of a deed. *Bowles* v. *Langworthy*, 5 T. R. 366; *Hall* v. *Phelps*, 2 Johns. R. 451.

H. Cushman in reply. Evidence of the declarations of Alden having been admitted, although objected to at the time, we were obliged to call him, in order to rebut such evidence, and if it was the duty of the demandants to make him their witness, the tenant ought to be placed in as good a situation as if they had done it. The declarations were not admissible before he had testified, but only to contradict his testimony.

Nov. 18*th* PARKER C. J. delivered the opinion of the Court to the following effect. The first question is, whether there was such proof of the loss of the deed as to authorize the admission of parol evidence to prove its contents. In some cases the proof may be very satisfactory that a deed is lost, as where it has been burnt; in others the evidence may be very uncertain, as where it only appears that the party cannot find the deed. In this latter class the rule that the party shall make affidavit, though not practised upon with us, seems to be proper enough;[1] for it is not admitting him to testify in his own

[1] A party to a suit may be a competent witness to prove the loss of a deed or record, for the purpose of letting in secondary evidence; but not to prove the contents of the deed or record. *Adams* v. *Leland*, 7 Pick. 62; *Taunton Bank* v. *Richardson*, 5 Pick. 436; *Hewes* v. *Wiswell*, 8 Greenl. 94; *Jackson* v. *Frier*, 16 Johns. R. 193; *Chamberlain* v. *Gorham*, 20 Johns. R. 144; *Meeker* v. *Jackson*, 3 Yeates, 442; *Seekright* v. *Wright*, 1 Haywood, 178; *Garland* v. *Goodloe*, 2 Haywood, 351; *Tayloe* v. *Riggs*, 1 Peters, 591 · *Blade* v. *Noland*,

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cause, but only admitting him to the privilege of using other evidence. If then this were a case of a deed being merely mislaid, perhaps we should require the demandants' affidavit. The testimony however of Mrs. Howard shows a surreptitious taking of the deed. The jury have found that it came into the hands of Alden Spooner wrongfully. If the action were against him, the demandants would recover by showing that fact, without any further evidence; and it is found that the tenant knew of the first conveyance before he purchased. This exhibits a different case from one in which the deed is supposed to be lost. The tenant knowing that the deed to Walter Spooner existed, he stands in the same situation with his grantor, and must be presumed to know how the deed came into his hands. This then is a case which precludes the necessity of going to the register of deeds and 288 getting his certificate that the deed was not in his office, or of making affidavit; and it would be a mockery of justice to require the party, who is injured by a fraudulent transaction, to call the fraudulent person to testify.

As to the declarations of Alden, what he said at the time of taking the deed out of the desk was a part of the *res gestæ*;[1] his other declarations, considering that the tenant knew of the conveyance to Walter, were admissible within the principle of *Bridge* v. *Eggleston*.[2]

Judgment according to the verdict.

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12 Wendell, 175. But see *Coleman* v. *Wolcott*, 4 Day, 388; *Cotton* v. *Beasley*, 1 Carol. Law Repos. 239; *Wright* v. *Jacobs*, 1 Aiken, 304.

[1] 1 Stark. Evid. (5th Amer. ed.) 62 *et seq.*; Roscoe's Dig. Crim. Evid. 20 to 23; *Little* v. *Libby*, 2 Greenl. 242; *Kimball* v. *Morrell*, 4 Greenl. 368, *Gorham* v. *Canton*, 5 Greenl. 266; *State* v. *Powell*, 2 Halsted, 244; *Bennet* v. *Hethington*, 16 Serg. & Rawle, 193; *Sewall* v. *Sewall*, 8 Greenl. 194.

[2] *Foster* v. *Hall*, 12 Pick. 99, 100. See *Cook* v. *Swan*, 5 Connect. R. 144; *Reizhart* v. *Castator*, 5 Binney, 109; 1 Stark. Evid. (5th Amer. ed.) 302 n. (1)

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JOHN A. PARKER *et al. versus* LEVI STANDISH.

In *case* for the continuance of an obstruction in a private way, a verdict and judgment on the general issue in a former action between the parties for the same obstruction, is admissible, though not conclusive, evidence to show that the plaintiff has a right to the way.

THIS was an action of trespass on the case for the continuance of an obstruction in and over a way. The defendant pleaded the general issue and two special pleas. At the trial, which was before *Wilde* J., the plaintiffs, to maintain the issues on their part, offered in evidence the verdict and judgment thereon recovered by them in a former action against the defendant and one Smith since deceased, for the erection of the obstruction, for the purpose of showing that they had a right to the way; but as trial was had in the former action on the general issue, and the right of way was not put directly in issue by the pleadings, the judge was of opinion that the verdict and judgment were not admissible as evidence, and they were accordingly rejected.

Nov. 16*th.* *W. Baylies* and *T. G. Coffin*, for the plaintiffs, contended that the verdict and judgment in the former action were admissible evidence, though not conclusive. The plaintiffs could
289 not have recovered in that action without proving a right of way in them; the judgment was therefore sufficient to throw the burden on the other side to show that this right had been devested or the obstruction removed. Phillipps on Evid. (2nd ed.) 226; *Kinnersley* v. *Orpe*, 2 Doug. 517; *Strutt* v. *Bovingdon*, 5 Esp. R. 58; *Miles* v. *Rose*, 5 Taunt. 705.

L. Williams and *Russell*, *contrà*, cited *Standish* v. *Parker et al.* 2 Pick. 20.

Nov. 18*th.* *Per Curiam.* For the reason assigned by the plaintiffs' counsel, we think the record in the former action was admissible evidence, though not conclusive.[1]

New trial granted.

[1] *Standish* v. *Parker*, 2 Pick. (2nd ed.) 22, n. (1); 2 Stark. Evid. (5th Am ed.) 705, 706; *Blakemore* v. *Glamorganshire Canal Co.* 2 Cromnt., Mees & Roscoe, 133.

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MARY HUNTER *versus* THOMAS BOUCHER.

Where a husband turns away his wife for the cause of her adultery, he is not liable on her contracts made with persons having notice that he has discarded her.

Whether the want of such notice, or a divorce refused on the ground of like criminality on the part of the husband, would make any difference, *quære*.

ASSUMPSIT. In a case stated the following facts were agreed. The plaintiff was the mother of Catherine Boucher, who at the time of the commencement of this action was the wife of the defendant and who had lived with him as such until the spring of 1824, when he caused her to be committed to gaol on a complaint against her for adultery. She was convicted of that crime, and remained in prison under sentence of court until the autumn of the same year. In the mean time the defendant had let his house, and had gone to live at board, but had retained one room in which his furniture was locked up. He was occasionally at his house both before and after the expiration of the sentence against his wife. Upon her release from prison she went to her mother's in Freetown, and lived there to the time of the commencement of this action, which was brought for her board. During this period the defendant boarded in the village of New Bedford, about three quarters of a mile from his house, and another family lived in the house. The defendant made no provision for the support of his wife, nor offered to do so, during this period, nor did she ever request him to do it, or ever return to New Bedford; but he advertised in the New Bedford Mercury, forbidding all 290
persons to trust her on his account. Since the action was commenced the defendant had obtained a divorce for adultery.

Bacon, in support of the action, said that the wife here did *Nov. 17th.*
not elope, and therefore it was not necessary for her to offer to return. Reeve's Dom. Rel. 81 *et seq.*; *Norton* v. *Fazan*, 1 Bos. & Pul. 226. The English doctrine in cases of this kind is repugnant to our statute, which provides that a divorce shall not be granted for adultery where both parties have been guilty. It could not have been the intention of the legislature to exempt the husband in such case from being liable to maintain his wife, for that would be throwing the whole penalty upon

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the wife. It would be absurd to refuse a divorce, if the husband were no longer bound for her support. If a husband turns away his wife, he is liable for necessaries furnished her. In regard to the advertisement, he cited *M'Cutchen* v. *M'Gahay*, 11 Johns. R. 281

L. Williams, contrà, referred to *Morris* v. *Martin*, 1 Str. 647; *Manwairing* v. *Sands*, ibid. 706; 1 Bac. Abr. 488, *Baron &c., H; Govier* v. *Hancock*, 6 T. R. 603; *Cox* v *Kitchin*, 1 Bos. & Pul. 338; *M'Gahay* v. *Williams*, 12 Johns. R. 293; and *M'Cutchen* v. *M'Gahay*, before cited.

Nov. 18*th.* PARKER C. J. delivered the opinion of the Court. It is admitted by the counsel for the plaintiff, that by the common law, as settled by the cases cited, this action cannot be maintained. And it is very clear from those authorities, that where the wife has eloped or left the husband, having committed adultery, the husband is not answerable for necessaries furnished; and this without notice to the persons who furnished them, for the very fact of separation is enough to put persons upon their guard, and to require them to ascertain the cause of separation,[1] whether from cruelty of the husband, in which case he is answerable, or from the crime of the wife, when he is not.

But it is suggested, that because by our statute a husband who has committed adultery himself cannot obtain a divorce on the ground of adultery committed by the wife, and as in England there can be no recrimination by which the liability
291 of the husband will be affected, the whole law on the subject here is different from the law in England. This however does not follow. If it had appeared that a divorce had been refused on the ground of a similar crime in the husband, perhaps the distinction would apply. But the general rule is the same here as there, *viz.* that a wife who is turned away from the house by the husband for the cause of adultery, she having committed that offence, does not carry with her credit upon the husband.[2]

[1] *Mainwaring* v. *Leslie*, 2 Carr. & Payne, 507; *Hindley* v. *Westmeath*, 6 Barn. & Cresw. 200. See *Kimball* v. *Keyes*, 11 Wendell 33.

[2] 2 Kent's Comm. (2nd ed.) 147. See *Rex* v. *Flintan*, 1 Barn & Adol. 227.

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The circumstances of this case preclude the necessity of determining the point of notice, whether requisite or not. The wife had been in gaol on a complaint for adultery, had been convicted, and afterwards went to her mother's house. This is such notoriety as will charge the plaintiff with knowledge, if that be necessary.

Plaintiff nonsuit.

WILLIAM WHITE *versus* DANIEL HALE *et al.*

An acknowledgment of a debt barred by the statute of limitations, by one of several joint debtors, is sufficient to take the case out of the statute as against all.

ASSUMPSIT for money had and received. Plea, the statute of limitations. The action was brought to recover money borrowed in 1814 by the agent of the Westport Cotton Manufacturing Company, then a voluntary association composed of the defendants, but which in 1815 was incorporated. To take the case out of the statute of limitations the plaintiff proved an acknowledgment of the debt within six years next before the commencement of the action, by two of the defendants. The whole number exceeded twenty. A verdict was found for the plaintiff.

Merrick for the defendants. In the case of *Bland* v. *Haselrig*, 2 Ventr. 151, it was decided, that if *indebitatus assumpsit* be brought for goods sold against four persons who plead the statute, and it be found that one of them promised within six years, there can be no judgment against him, for the contract being entire, it must be found that they all promised. This establishes the position, that the action could not be maintained against all, because all did not promise. In *Baxter* v. *Penniman*, 8 Mass. R. 134, the Court say, "The sound principle, which ought to govern in the construction of the statute is, that a presumption arises that the defendant, from the lapse of time, has lost the evidence which would have availed him in his defence, if seasonably called upon for pay- *Nov. 16th.* 292

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ment But when this presumption is rebutted by an acknowledgment of the defendant within six years, the contract is not within the intent of the statute." Taking this as the rule, it would be repugnant to justice that one in whose favor this presumption had arisen, should be defeated of his rights by an admission which he refused to make, or at least in which he had no participation. The great body of the defendants believe that the plaintiff has in fact received his money; and can it be reasonable that an acknowledgment by one who has no knowledge of the transactions of a great copartnership, or who may not remember them, shall rebut the presumption which has been created in favor, not only of him who makes the admission, but of many others who believe the admission to be founded in error? The presumption is in favor of all; the acknowledgment is personal. After a copartnership is dissolved, one partner can no longer bind his associates. The copartnership once subsisting between the defendants was dissolved in 1815, when the charter of incorporation was obtained. The earliest acknowledgment in the case was not till more than six years after the plaintiff had knowledge of the dissolution.

W. Baylies and *H. Cushman*, to show that the acknowledgment of one joint debtor was sufficient, cited *Smith* v. *Ludlow*, 6 Johns. R. 267; *Johnson* v. *Beardslee*, 15 Johns. R. 3; *Whitcomb* v. *Whiting*, 2 Doug. 652; *Jackson* v. *Fairbank*, 2 H. Bl. 340; *Wood* v. *Braddick*, 1 Taunt. 104.

Nov. 18th. PARKER C. J. delivered the opinion of the Court. There was competent evidence for the jury to find a new promise upon, provided the acknowledgment by Nichols and one other is sufficient to charge the whole of the company. And 293 we think the authorities cited by the plaintiff's counsel clearly maintain that position. The case cited from *Ventris* is not of a different character. The case is, if *indebitatus assumpsit* be brought against four persons, all of whom plead the statute of limitations, and the jury find that one promised within six years, there can be no judgment *against him*. And this is because the verdict does not pursue the issue; and besides, the contract being joint, all or none should be charged. The

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fault was in not considering the promise of one as binding upon all. This is explained in a note to the case cited from Douglas.

Judgment according to the verdict [1]

The Inhabitants of RAYNHAM *versus* The Inhabitants of CANTON.

In a question of the settlement of a female pauper, depending on the validity of her marriage, the pauper and her supposed husband are competent to testify concerning the marriage.

In such a case proof of a marriage *de facto* in another State is sufficient to throw the burden of proof on the party impeaching its validity. *Semble.*

A statute of another State, or its repeal, cannot be proved by parol evidence.

A book purporting to contain the statutes of any one of the United States and to be printed by its authority, is *primâ facie* evidence of the written law of such State.

Aliter of a printed book of statutes of a foreign nation. *Semble.*

THIS was an action of *assumpsit* brought to recover a sum of money expended by the plaintiffs for the support of three paupers, namely, Elizabeth Wentworth and her two children.

The cause was tried in the Court of Common Pleas, before *Williams* J., upon the general issue.

The plaintiffs proved that one John Wentworth was an inhabitant of Canton, and contended that Elizabeth was his lawful wife; which was denied by the defendants. The plaintiffs exhibited a certificate, that the marriage was not

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[1] *Getchell* v. *Heald*, 7 Greenl. R. 26; *Bound* v. *Lathrop*, 4 Connect R. 336; *Ward* v. *Howell*, 2 Harr. & Johns. 60; *Hunt* v. *Bridgham*, 2 Pick. (2nd ed.) 583, note; *Martin* v. *Root*, 17 Mass. R. 227; *Frye* v. *Barker*, 4 Pick. 384; *Hathaway* v. *Haskell*, 9 Pick. 42; *Cady* v. *Shepherd*, 11 Pick. 407, 408; *Perham* v. *Raynall*, 9 Moore, 566; *Wood* v. *Braddick*, 1 Taunt. 104. See *Atkins* v. *Tredgold*, 2 Barn. & Cressw. 23; *Bell* v. *Morrison*, 1 Peters, 351; *Levy* v. *Cadet*, 17 Serg. & Rawle, 126; *Searight* v. *Craighead*, 1 Rawle, Penr. & Watts, 135, *Hopkins* v. *Banks*, 7 Cowen, 650; *Baker* v. *Stackpoole*, 9 Cowen, 420; *Pittam* v. *Foster*, 2 Dowl. & Ryl. 363; *S. C.* 1 Barn. & Cressw. 248.

The law as laid down in the text is now altered by the Revised Statutes of Massachusetts, so that a joint contractor shall not lose the benefit of the provisions of the statute of limitations, by reason only of any acknowledgment or promise made or signed by any other or others of his co-contractors. Revised Stat. *c.* 120, § 14. But see *Sigourney* v. *Drury*, 14 Pick. 387

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recorded where it was alleged to have taken place, and then called the pauper to give evidence respecting the supposed marriage. To this the defendants objected, but the evidence was admitted.

294 The defendants then offered to give in evidence the declarations of John Wentworth respecting the supposed marriage, but his declarations were excluded. He had been summoned by the plaintiffs to give evidence, but he did not appear in court.

The marriage was alleged to have taken place in the State of Rhode Island, in January 1817, and in the course of the trial the requisitions of the law of Rhode Island with respect to marriage came in question. The defendants offered in evidence a volume of the laws of that State, purporting to be published by authority of the General Assembly in the year 1798. The plaintiffs denied that the law in that volume was the law of Rhode Island at the time of the supposed marriage, and the court did not permit the book to be used in evidence. Peter B. Hunt, a sworn attorney of the courts of Rhode Island, was then called by the plaintiffs to testify as to what the law of that State required in 1817, to make a marriage valid. The defendants objected to his testifying, but the objection was overruled. The court then permitted the book before mentioned to go to the jury, with the testimony of Mr. Hunt as to his understanding of the actual law of Rhode Island touching the solemnization of marriages.

The jury returned a verdict for the plaintiffs; whereupon the defendants filed exceptions to the foregoing decisions of the court.

Nov. 17*th.* *W. Baylies*, *Parsons* and *Russell* in support of the exceptions. In England the pauper's testimony as to her marriage would be admissible; *Rex* v. *Bramley*, 6 T. R. 330; but not so in this State. There fornication, or even adultery, is not punishable in the courts of common law; here a woman who has cohabited with a man cannot be asked the question whether they were married, for an answer in the negative would expose her to a criminal prosecution.

As the woman's testimony, in other words, her declarations were admitted, the declarations of John Wentworth (which

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were made before the dispute arose, though that fact is not expressly stated in the bill of exceptions) should also have been received. *Berkeley Peerage case*, 4 Campb. 401, and 3 Stark. Evid. 1104. [*Parker* C. J. Must not the person whose declarations are received, be dead, or incompetent to testify, &c. ?] In *Reed* v. *Passer*, Peake's Cas. 231, it does not appear that the person was not living. Here the man, for the reason before given in regard to the woman, was incompetent to testify, and his declarations therefore should have been admitted.

The statute book offered in evidence, purporting to have been printed by authority of the State of Rhode Island, was admissible by itself. *Kennebeck Prop.* v. *Call*, 1 Mass. R. 483; *Thompson* v. *Musser*, 1 Dallas, 462; *Poindexter* v. *Barker*, 2 Haywood, 173; *Biddis* v. *James*, 6 Binney, 321; *United States* v. *Johns*, 4 Dallas, 415. The repeal of the statute produced must have been by a written law, and could not be proved by parol evidence, but only by the production of the repealing statute. *Church* v. *Hubbart*, 2 Cranch, 236; *Livingston* v. *Maryland Ins. Co.* 6 Cranch, 280; *Boehtlinck* v. *Schneider*, 3 Esp. R. 58; *Kenny* v. *Clarkson*, 1 Johns. R. 386; Peake's Evid. (Norris's ed.) 55. The witness was called, not only to show that the statute was repealed, but also to show what was the law of marriage in Rhode Island in 1817. His testimony was in fact his construction of the statutes.

H. Cushman, for the plaintiffs, being directed by the Court to confine himself to the last objection, observed that as a marriage *de facto* in Rhode Island was proved, the burden was on the other side to show that it was invalid. It appeared at the trial that there had been a revised edition of the laws of Rhode Island, printed subsequently to the volume produced, so that this volume did not afford a presumption of what was the law of marriage in 1817. Not being authenticated by a certificate of the secretary of that State, it was only a species of parol evidence, and the testimony of Mr. Hunt was properly admitted to control it. But if his testimony was improperly received, the verdict ought not therefore to be set aside since the defendants did not prove by legal evidence the in

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validity of the marriage. He referred to some of the authorities before mentioned, and cited also *Frith* v. *Sprague*, 14 Mass. R. 455; *Buttrick* v. *Allen*, 8 Mass. R. 273; *Young* v. *Bank of Alexandria*, 4 Cranch, 384.

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PARKER C. J. We think the testimony of the woman was properly received. It is admitted that according to the law of England it should be received, but it is contended that fornication being here a punishable offence, the law is different as to the competency of the guilty parties to testify. But this would make no other difference than that the woman called may refuse to answer. If she makes no objection, then her liability to punishment and desire to screen her reputation are things which affect her credibility only.[1]

The declarations of John Wentworth were rightly rejected, since he might have been produced on the trial. It was said that his declarations should be opposed against the declarations of the woman; but that would be letting his simple declarations go against hers made under oath.

With respect to the rejection of the book offered in evidence, we concur with the courts of Pennsylvania and some other States, and the court of the United States, in holding that a volume purporting on the face of it to contain the laws of a sister State, is admissible as *primâ facie* evidence to prove the statute law of that State.[2] It certainly is the best evidence next to an exemplification or authenticated copy, to require which would put the citizens to an unnecessary burden and expense. It is better evidence than the testimony of any individual who may know the general purport of the law, but cannot carry in his mind so minute a knowledge as may sometimes be necessary in the application of such law.

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[1] See *Carnaghan's case*, 6 Rogers's Rec. 45; *Southard* v. *Rexford*, 6 Cowen, 254; *Parkhurst* v. *Lowton*, 2 Swanston, 215; Burr's Trial, 245; 1 Stark. Evid. (5th Amer. ed.) 165 to 173; *United States* v. *Craig*, 4 Wash. C. C. R. 729; *Johnston* v. *Goss*, 2 Yerger, 110; Roscoe's Dig. Crim. Evid. 129 to 135.

[2] Confirmed, Revised Stat. *c.* 94, § 59. In England the law of France as to marriage may be proved by the production of a printed book, purporting to contain the code of France, and proved by parol testimony to contain the law of that country. *Lacon* v. *Higgins*, 3 Stark. R. 178; *S. C.* Powl. & Ryl. N. P. Rep. 38.

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The distinction between written and unwritten law in regard to the manner of proving them, is very sensible. Common law may be considered as custom, which may be proved by parol;[3] indeed there is no other way of proving such law, unless by reports, but in some countries there are no reports. Written law of all civilized countries exists in records and may be proved with certainty. In case it appeared that a foreign statute could not be procured, properly authenticated, then perhaps oral evidence of the law might be admissible.[4]

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In England it does not seem to be settled, that printed books of foreign laws are to be received in evidence, and we do not mean to decide that the law of any country merely foreign may be so proved. But the connexion, intercourse and constitutional ties which bind together these several States, require that this species of evidence should be sufficient until contradicted.[1]

Then the question will arise, how shall it be contradicted. Certainly not by the testimony of one who may have merely resided a short time in the country, nor by that of any citizen or subject; for there is no fact which it would be more difficult to establish by such evidence.

The law being proved to have existed, in the manner above

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[3] Confirmed, Revised Stat. *c.* 94, § 60. The usual course is to make such proof by the testimony, under oath, of competent witnesses instructed in the law. Story on Conflict of Laws, 530. See *Haven* v. *Foster*, 9 Pick. 130; *Rex* v. *Wakefield*, cited in 2 Russell, 624; *Douglass* v. *Forrest*, 4 Bingh. 699, *Talbot* v. *Seeman*, 1 Cranch, 12, 38; *Church* v. *Hubbart*, 2 Cranch, 237; *Strother* v. *Lucas*, 6 Peters, 763; *Dalrymple* v. *Dalrymple*, 2 Haggard Consistory Rep. *Append.* 15 to 154; *Frith* v. *Sprague*, 14 Mass. R. 455; *Hill* v. *Packard*, 5 Wendell, 375; *Brackett* v. *Norton*, 4 Connect. R. 517; *Hempstead* v. *Reed*, 6 Connect. R. 486; *Denison* v. *Hyde*, 6 Connect. R. 508; *Middlebury College* v. *Cheney*, 1 Vermont R. 336; *Dougherty* v. *Snyder*, 15 Serg. & Rawle, 87; *Ripple* v. *Ripple*, 1 Rawle, 386; *Le Roy* v. *Crowningshield*, 2 Mason, 151; 2 Stark. Evid. (5th Amer. edit.) 331, notes; Roscoe's Dig. Crim. Ev. (Amer. edit.) 138, n. (1).

[4] See Revised Stat. *c.* 94, § 61.

[1] See *State* v. *Slade*, 1 Chipman, 303. In *Craig* v. *Brown*, 1 Peters's C. C. R. 352, it was held, that printed statute books not authenticated by the seal of the State, are not admissible evidence in any other State. This decision has been followed in North Carolina. *State* v. *Twitty*, 2 Hawks, 441; 1 Stark. Ev. (5th Amer. edit.) 176, n. (2). But see Revised Stat. of Mass. *c.* 94, § 59.

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stated, it must be presumed to exist until proved by as good evidence to have been repealed. Now we think it difficult, if not impossible, to do this by oral evidence. Laws are sometimes repealed by implication. Sometimes an act purporting to repeal, leaves some of the former acts in force. Questions of construction arise, and the law is to be ascertained not only by the words, but by reference to the subject matter, pre-existing laws, &c. We think therefore that the Court of Common Pleas erred in rejecting the book. It is true it was afterwards admitted, but accompanied by the testimony of Mr. Hunt; it should have been admitted free of his testimony.

It is said on behalf of the plaintiffs, that a marriage *de facto* being proved, it should be presumed to be according to the laws. And this appears to be reasonable. As if a marriage were proved to have taken place in France, for instance, it should seem fit to require the party who denies the marriage to prove its invalidity. Still however in the case before us the law was in question, and it is proper that there should be a new trial.

New trial granted.

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298 GILBERT ALLEN *et al. versus* EDWARD AYRES *et al.*

A, being indebted to B, agrees to give him a note to be discounted at a bank, and accordingly gives one signed by himself as principal and C as surety, payable to the bank. The bank refuses to discount it or to authorize a suit in the name of the bank; whereupon B sues both promisors in his own name. *Held*, that C, being by the terms of the contract liable only to the bank or their assignees, and there being no evidence of privity between him and B, the action would not lie.

THIS was an action of *assumpsit* upon a promissory note, in which "John S. Johnston as principal and Edward Ayres as surety jointly and severally promise to pay the President, Directors & Co. of the Bedford Commercial bank or order three hundred dollars on demand," &c.

To maintain the action the plaintiffs proved, that prior to the date of the note Johnston owed them about 300 dollars as

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a balance of accounts, and when called upon to pay this balance offered to procure a good note, which would enable them to obtain the money from the Bedford Commercial bank; that they assented, provided such a note could be obtained as would not require their names. Johnston accordingly made the note in suit, and obtained the signature of Ayres, and delivered it to the plaintiffs in payment of the balance due to them. The plaintiffs presented the note to the bank for discount, but the directors refused to discount it. It was afterwards taken from the bank by the plaintiffs and had ever since remained in their possession.

The plaintiffs also offered to prove that notes of this kind were frequently negotiated at the bank, and that it was common for debtors to make such notes, intending them as accommodation notes, and to deliver them to their creditors, who procured the discount.

It was in evidence that the bank refused to negotiate this note to the plaintiffs, or to suffer them to bring an action in the name of the bank.

The defendants contended that the plaintiffs, not being named in the note, could not maintain this action; that there was no privity of contract between them and Ayres.

Wilde J., before whom the cause was tried, directed a nonsuit, subject &c.

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. *W. Baylies* and *Coffin*, for the plaintiffs, cited *Marchington* v. *Vernon*, 1 Bos & Pul. 101, note *c*; *Tatlock* v. *Harris*, 3 T. R. 180; *Arnold* v. *Lyman*, 17 Mass. R. 400; *Bishop* v. *Hayward*, 4 T. R. 470; Lawes on Assumpsit, 333, citing Bayley, 105.

L. Williams and *Warren* for the defendants.

Nov. 19th.

PARKER C. J. Without evidence that the note was intended by the defendant Ayres for another use and purpose than the words of the promise import, we cannot see how it can by any form of action be converted into a promise to the plaintiffs. It was made payable to the Bedford Commercial bank, and the plaintiffs do not derive a title from that bank.

The evidence tending to show that Johnston procured the note for the use and benefit of the plaintiffs, and that it was delivered by him to them to enable them to raise money to

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satisfy his debt, might form good ground of action against Johnston, and perhaps make him answerable upon the note itself; but there is no evidence reported which has a tendency to prove that Ayres made any contract with the plaintiffs, or that he knew the purpose for which the note was given. He has a right therefore to insist upon the terms of the contract, and that he is liable to none but those to whom he made the promise and their lawful assignees.

The nonsuit was therefore rightly ordered.

Pierce *versus* Pierce.

A divorce will not be granted for adultery of the wife committed through the husband's procurement.

This was a libel for a divorce *a vinculo* for adultery committed by the wife.

Nov. 19th. Parker C. J. A majority of the Court are against granting a divorce. One instance of adultery was proved, but there is reason to think that the husband was the cause of its being committed. It would be a dangerous principle to establish, 300 that a husband who has suspicions of the infidelity of his wife, shall be allowed to lay a train which may lead her to the commission of adultery, in order that he may take advantage of it to obtain a divorce. As we are clear that the adultery proved was committed with the knowledge and consent of the libellant, and probably with his connivance, a divorce will not be granted.

W. Baylies, *Parsons* and *Russell* for the libellant.

H. Cushman and *P. B. Hunt* for the libellee

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CROMWELL GOFF *versus* ENOCH FOWLER.

A license granted by the Court of Sessions is valid, and will protect the person licensed, notwithstanding the anterior proceedings may have been irregular.

Any building used for the common purposes of an inn and situated within its curtilage, is a "dependency" of such inn, within the meaning of *St.* 1786, *c.* 68.[1]

THIS was an action of debt for penalties alleged to have been incurred by the defendant under *St.* 1786, *c.* 68, regulating licensed houses. Plea, the general issue.

The defendant admitted that he kept an inn and a store in Rehoboth, and that he sold various distilled spirits in them, as alleged in the writ, but he contended that he had been duly licensed so to do.

It appeared that he was licensed as an innholder; but the plaintiff insisted that the license was void, because the certificate of the selectmen of Rehoboth did not conform to the statute (§ 2), but merely recommended the defendant "as being a suitable person to receive a license."

The plaintiff objected also, that the license did not extend to the store; but the defendant contended that he had a right to sell by retail, as well in his store as in his dwellinghouse, on the ground that the store was a *dependency* of the house, within the meaning of the statute. The store stood between two and three rods from the house, and between the house and a shed used for the accommodation of travellers. The store and shed were contiguous and served in part to enclose the defendant's field in which his house was situated. The upper story of the store was sometimes used by the defendant as a dining-hall on muster days and at other times, and beds were set up in it for occasional use. 30

Upon these facts *Wilde* J. directed a nonsuit, subject to the opinion of the whole Court.

The cause was argued by *H. Cushman* for the plaintiff, and *Cobb* for the defendant. *Nov.* 16*th.*

PARKER C. J. delivered the opinion of the Court. The objection to the license on the ground that the certificate of the selectmen was not conformable to the statute, we think ought *April term* 1826, *at Taunton.*

[1] See Revised Stat. *c.* 47, § 9.

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not to prevail. The act of the Court of Sessions, in granting the license, is, we think, conclusive, and ought not to be vacated on account of the informality of anterior proceedings. It is the duty of that court to inspect such certificates and adjudicate thereon, and they are the proper judges of their sufficiency. It would be laying a snare for persons who obtain a license and pay the excise thereon, to leave them subject to prosecution for keeping an inn without license, by allowing any informer to unravel the proceedings of the court in order to detect some irregularity therein.*

We think also the facts reported show that the acts complained of were lawful under the defendant's license, the place where the liquors were sold being a dependency of the house which was licensed. We might suppose that the legislature, by the word *dependency*, intended some building detached from the house, otherwise the word was wholly useless, for the word *house* would comprehend outhouses and appurtenances connected therewith.[1] It was without doubt supposed that it might be convenient, if not necessary, for some innholders to have more than one building for the accommodation of different sorts of travellers upon the road, and that sometimes the common bar-room might be more conveniently kept in a building separate from that which is used for the refreshment and repose of quiet travellers, in order that teamsters and others travelling in the night may be accommodated with refreshment, without disturbing those who have betaken themselves to
302 sleep; so that any building used for the common purposes of a tavern, situated within the curtilage of the dwellinghouse, we think, is privileged by the license, as a dependency of the common inn or tavern-house. The store in which the liquors were sold was so connected with the inn as to be within the curtilage, and so a dependency.

Nonsuit made absolute.

* See *Commonwealth* v. *Bolkom*, *ante*, 281.
[1] See 3 Chitty's Crim. Law, (3d Am. ed.) 1103 to 1106, and notes.

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JOSEPH RAY *et al. versus* JOSEPH UNDERWOOD, Principal, and JOSEPH HAWES, Trustee.

A person who has never been an inhabitant or resident within this commonwealth, but who only comes here occasionally in the day time, is not liable to the trustee process.

THE principal defendant lived in Seekonk in the county of Bristol, and the supposed trustee was called in the plaintiffs' writ, "Joseph Hawes now commorant of Seekonk." It was agreed that Hawes lived in North Providence in Rhode Island, and had never been an inhabitant of this State; that he occasionally visited a manufacturing establishment at Seekonk in which he was interested, but that he never lodged in Seekonk.

W. Baylies, *Sanford* and *Darling*, for the plaintiff, cited *Parker* v. *Danforth & Trs.* 16 Mass. R. 299. *Nov.* 17th.

Cozzens, for the supposed trustee, relied on *Tingley* v. *Bateman & Tr.* 10 Mass. R. 343.

PARKER C. J. delivered the opinion of the Court. It being agreed that the person summoned as trustee was not an inhabitant of, or resident within, any town in this commonwealth, but that he only came within it occasionally in the day time to look after some of his property, having his home all the time within the State of Rhode Island, we are of opinion that he is not liable to this process within this jurisdiction.[1] We see no distinction in principle between this case and the case of *Tingley* v. *Bateman & Tr.* *April term 1826, at Taunton*

[1] By the Revised Statutes it is enacted, that any person having any goods, effects or credits of the principal defendant entrusted or deposited in his hands or possession, may be summoned as a trustee. Revised Stat. c. 109, § 4

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CHARLES E. WEST *versus* THOMAS BROCK *et al.*

Three defendants in trespass joined in a plea in the Court of Common Pleas, which was demurred to, and in this Court, the plea and demurrer being waived, they pleaded severally and two were acquitted. *Held*, that the two should recover joint costs to the time of severing in their pleas, and several costs afterwards. *Held*, also, that they should recover two-thirds of the costs of depositions taken and witnesses summoned for the use of all three before they severed.

TRESPASS against Brock, Barnard and Chace for an assault and battery. The action was entered in the Court of Common Pleas at September term 1823, and was continued till March term 1824, when it was brought into this Court by demurrer. The defendants pleaded jointly in the court below. Here the plea and demurrer were waived and they pleaded severally a justification; and upon a trial the plaintiff obtained a verdict against Brock only. The two others now claimed several costs. Depositions had been taken and witnesses summoned, before the severance in the pleas, for the use of all the defendants.

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Per Curiam. The defendants who were acquitted are entitled to joint costs to the time of their pleading severally, and to separate costs afterwards.* The costs of the depositions and witnesses are to be apportioned, so that they shall recover two-thirds of such costs.[1]

T. G. Coffin for the plaintiff.

L. Williams and *Warren* for the defendants

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* See *Ewer* v. *Beard et al.*, *ante*, 64.

[1] See *Durgin* v. *Leighton*, 10 Mass. R. 58.

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COMMONWEALTH *versus* JAMES BLANDING.

A libel was published in a newspaper printed in another State, but which usually circulated in a county in this State, and the number containing the libel was actually received and circulated in such county. *Held*, that this was competent and conclusive evidence of a publication within such county.

The malicious intent charged in an indictment for a libel, where the truth of the facts contained in the libel is not admitted in evidence, is an inference of law.

The provision in the constitution securing the liberty of the press, was intended to prevent any previous restraints upon publications, and not to affect prosecutions for the abuse of such liberty.

The general rule is, that upon indictment the truth of a libel is not admissible in evidence. Whether in any particular case such evidence is admissible, is to be determined by the court; and if admitted, the jury are to determine whether the publication was made with good motives and for justifiable ends.

On an indictment for a libel published in a newspaper, charging a person with misconduct as an innkeeper, for which he was liable to punishment, it was *held*, that the truth of the libel was not admissible in evidence.

Publishing a correct account of a judicial proceeding, but with comments and insinuations tending to asperse a man's character, is libellous.

THIS was an indictment charging the defendant with making, framing and causing to be published in a newspaper, called the Providence Gazette, at Rehoboth, in the county of Bristol, on the 20th of February, 1822, a false, scandalous and libellous paragraph concerning one Enoch Fowler, he then being an innholder in that county, and a good and peaceable citizen, &c.

On the trial, before *Wilde* J., it was proved that the defendant delivered the writing set forth in the indictment to the printer of the Providence Gazette, at Providence, in the State of Rhode Island, and that it was published in that paper at the request of the defendant, who acknowledged that he was the author of it; and it was proved that that paper circulates in Rehoboth, and had so circulated previously to such publication; and that the number containing this writing was received and circulated in that town.

The defendant offered to give in evidence a coroner's inquest alluded to in the libel, to prove that the allegations contained therein were true; and he also offered to prove the truth of all the allegations in the writing. But this evidence was not admitted.

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The defendant contended that there was no evidence that the writing was composed or published in the county of Bristol; but the jury were instructed, that the causing of it to be published in the Providence Gazette, the defendant knowing that that newspaper was taken and circulated in Rehoboth, was a sufficient publication within the county.

The jury were also instructed, that the malicious intent charged in the indictment was an inference of law, it not being competent for the defendant to prove the truth of the facts alleged, and there being no such proof in the case; and that although the jury were, with the advice of the Court, the judges of the law and the fact, yet they were bound to decide according to the law as actually established, whatever might be their opinion of its policy; and that unless they knew the law to be otherwise, they ought to receive it from the judge, whose instructions, if incorrect, would be subject to revision and correction by the whole Court.

A verdict was returned against the defendant; but if these instructions were wrong, or if the evidence offered by the defendant should have been admitted, the verdict was to be set aside and a new trial granted, or the defendant was to be discharged, according as the whole Court might direct.

Nov. 16th. *W. Baylies* for the defendant. The supposed libel contains a just representation of the verdict of the coroner's jury, accompanied with temperate and useful remarks. The defendant offered in evidence the inquest, and proposed to prove that all the allegations in the supposed libel were true. This evidence, which was rejected, ought to have been admitted, to show the intent with which the publication was made. We do not say it would be conclusive, or that the facts, if true, would be a justification, but it was proper and pertinent evidence to go to the jury. We wished to show that the defendant was not influenced by malice, but by a regard to the public interest. The jury were instructed that the intent and tendency of the writing were inferences of law; that it was immaterial whethe it were true or not; that they had power to determine th
306 law, but that they would do it on their own responsibility If this is the law, it is founded on authority only, and not upo reason. To say that the intent is not a question for the jury

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that any writing containing an accusation, whether true or false, is a libel, appears as unreasonable as it would be to adopt the sentiment of an ingenious writer, that every person should be at liberty to publish every thing, and the public should be left to judge, from the collision of statements, what is true and what false. It may be considered by the Attorney-General, and perhaps by the Court, that the law of libel is settled by the English authorities, and that we are bound by them. By Mr. Fox's bill, and the discussion to which it gave rise, it appears that it was formerly held to be the law of England, that whether a writing were a libel or not, was to be determined by the Court. The question is now to be decided, whether the law, as laid down by Lord *Mansfield* and the other judges, is the law of this commonwealth. Mr. Fox's bill in some measure enlarges the power of the jury, and tends to prevent the encroachment of arbitrary judges; the jury are no longer told in England, that the intent and tendency of a writing are mere inferences of law. But that bill never became the law of this land. [*Attorney-General.* The principle of it has always been the law of this land.] It was held by *Lewis* C. J. that it was not the law of New York. We must then go up to the Court of Star Chamber for our law of libel, if the instructions at the trial were correct. We understand that the learned judge laid down the law as it was laid down by Lord *Mansfield*; that the intention was to be collected from the paper itself; that it was an inference of law, and that the jury were to take the law from the Court; that though they had the physical power, by returning a general verdict, to determine the law, they had not the right. There has always been a collision on this subject between the court and the jury. Mr. Burke, in his Speech on a Bill for explaining the Powers of Juries in Prosecutions for Libels, considers the courts as having improperly departed from the ancient common law. He says, "The doctrine in the case of a trial by indictment or information for a libel, laid down by several judges, amounts to this, that the jury have no competence 307 where a libel is alleged, except to find the gross corporeal facts of the writing and the publication, together with the identity of the things and persons to which it refers; but that the

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intent and tendency of the work, in which intent and tendency the whole criminality consists, is the sole and exclusive province of the judge. Thus having reduced the jury to the cognizance of facts not in themselves presumptively criminal, but actions neutral and indifferent, the whole matter in which the subject has any concern or interest, is taken out of the hands of the jury; and if the jury take more upon themselves, what they so take is contrary to their duty; it is no *moral* but merely a *natural* power, the same by which they may do any other improper act, the same by which they may even perjure themselves with regard to any other part of the issue before them." Burke's Works, *vol.* 5, *p.* 324.

But the law of libel, even as now expounded in England, is not free from absurdity; as is shown in a review of Holt's Law of Libel, in Edinb. Rev. *No.* 53, *p.* 102. By their law, the presumption is as strong that a party publishes maliciously what is true, as well as what is false. Holt, 55, 56. This is absurd. The judges there have been embarrassed by their own decisions. In some cases they admit the truth in evidence; and in others they reject it. *Rex* v. *Horne*, Cowp. 575; *People* v. *Croswell*, 3 Johns. Cas. 389; Holt, 171. In *Rex* v. *Burdett*, 4 Barn. & Ald. 147, 324, *Bayley* J. says, that in some cases the falsehood may be the very essence of the libel; instancing the case of a man's being charged with having been convicted of perjury. So it is in regard to comments on literary works and places of public amusement. 3 Selw. N. P. 926; 1 Russell on Crimes, 333, 334. The conclusion we come to is, that the doctrine of excluding the truth is against reason, against the policy of our free representative government, and against the original grounds of the common law, as clearly shown by *Kent* J. in 3 Johns. Cas. 384, whose opinion is acquiesced in by *Thompson* J.

It is there shown also, that this doctrine is not agreeable to the constitution of the United States, nor to that of New York. And our own constitution provides, that the freedom
306 of the press shall not be infringed. It will be said, this means that there shall be no previous inhibition against publishing any thing. If that is all, the provision is illusory. The freedom of the press, however, as defined by Hamilton, *arguendo*,

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(3 Johns. Cas. 352,) "consists in publishing with impunity, truth with good motives and for justifiable ends, whether it relates to men or measures." This definition is adopted by *Kent* J. (ibid. 393), and in this sense, it is apprehended, the terms *liberty of the press* were used in our constitution.

The Attorney-General will rely on the case of *Commonwealth* v. *Clap*, 4 Mass. R. 163, in which evidence of the truth of the libel was rejected. That was the case of a libel posted up in the streets, containing only general invective. The case may be law, without affecting the one now before the Court. And *Parsons* C. J. there makes a very sensible exception to the general rule, though it is not to be found in the books, namely, that the character of a candidate for a public elective office is a proper subject of remark; and upon the ground, that it is the interest of the people to know his merits. The case at bar comes within the same principle. It concerns the people to know that the prosecutor kept a public house in an improper manner. It was serving the cause of morals and religion to hold his house up to public reprobation.

In 1805 a report was made and accepted in the House of Representatives, on the subject of a piece published in the New England Palladium, entitled the Monarchy of Federalism, in which report it is said, that our political institutions insure to every citizen the right "to publish truth from good motives and for justifiable ends, although it reflects on government, magistrates or individuals," and "that the law of England, on the subject of libels, which holds that the greater the truth is, the greater is the libel, is not the law of this land."

A resolution declaratory of the law of libel was introduced in the convention of 1820 for revising our constitution; and in the debate upon it Mr. Jackson, then a justice of this Court, said, "The principle of the law is, that one may always pub- 309
lish the truth from right motives and for justifiable ends." Mass. Convention, *p.* 244. This contains all that we contend for in the present case. It is a deliberate opinion, and is entitled to at least as much weight as an opinion at *nisi prius*. He puts a case. "Suppose an apothecary in vending medicines, sells those which are poisons, no one can doubt that it is my duty to inform."

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A distinction is sometimes made between libels which charge one with a triable offence, and those which do not; but it is apprehended that the distinction is not well founded. Suppose that a company of swindlers have gone from this State to New York, will it be libellous to write that such persons are swindlers, and that they have gone to New York? So we sometimes see advertisements that such a stagecoach or stage tavern is ill kept. If this is intended for the public good, it is justifiable.

It will be said, however, that a libel, though true, is criminal, because it tends to a breach of the peace. This is a gross fiction. Whether it has that tendency is a question of fact. Would the Court permit the defendant to show that the prosecutor was so peaceable a man that there was no danger of a breach of the peace? The true ground is, that a libel is an attack on a man's character, against which he is entitled to protection. On the other ground, the law punishes more heavily what only tends to a breach of the peace, than an actual breach. What becomes of this regard for the peace, when a man is permitted to utter verbal defamation in a public assembly, without being subject to a criminal prosecution? Edinb. Rev. *No.* 53, *p.* 127.

It will be said, it is hard that a man's character should be defamed behind his back at the trial, when he is not a party to the suit, and has no opportunity to defend his character. This may have more weight in public than in private libels. In the latter class the person libelled is generally the prosecutor, and in this particular instance he was both prosecutor and witness. In England, the court refuses to grant an information for a private libel charging a particular offence, unless the prosecutor will upon oath deny the charge.

310 Another ground which we take is, that this inquisition was a judicial proceeding; and a fair statement of it, accompanied with defamatory inferences, is not a libel. Holt, 171, 173; *Rex* v. *Wright*, 8 T. R. 293, 297.

There was no evidence of a publication in the county of Bristol. The defendant gave the writing to the printer in Rhode Island. The presumption is that it was written and published where it was first seen, which was in that State. Putting the

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piece in a paper printed in another State, in the publication of which the defendant had no agency, is not a publication in the county of Bristol. Merely knowing that the paper would circulate there is not sufficient. In *Rex* v. *Burdett*, 4 Barn. & Ald. 147, *Bayley* J. held that the whole *corpus delicti* must be in the county. Burdett lived in Leicestershire, and there wrote the libel, which appeared in a paper printed in London. He was indicted in Leicestershire, and the object was to prove a publication there. The writing was delivered to an agent in that county, and when it was received in London it was in an envelope, and the jury were told that it might be presumed to have been in an open envelope when it was delivered to the agent. Now if the circulation of the paper in Leicestershire had been sufficient evidence of publication, recourse would not have been had to this narrow point of the libel's going sealed or unsealed to London.

Morton, Attorney-General, for the prosecution, said it had never been denied in this commonwealth, that the jury had a right to determine the law and the fact, on an indictment for a libel. This Court had never told the jury to determine the fact of publication and the truth of the innuendoes, and leave the question of libel or not to the Court.

The reason why the government takes notice of a libel, is because it tends to a breach of the peace; consequently the truth of it is immaterial and inadmissible in evidence. But there are some exceptions, as in the case of a petition to parliament, a complaint to a court of justice, and some others. *Lake* v. *King*, 1 Saund. 133; Skin. 124; *Rex* v. *Wright*, 8 T. R. 293; *Commonwealth* v. *Clap*, 4 Mass. R. 163. If the defendant had with upright motives made this representation to the court of sessions, in order to prevent a renewal of Fowler's license to keep an inn, it would not have been libellous; and that was his proper course to pursue. It was his going beyond that which proves the malice.

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The obvious meaning of the liberty of the press is that there shall be no previous restraint on publications. 4 Bl Com. 151, *et seq.*

He also insisted that there was sufficient proof of a publication in the county of Bristol.

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PARKER C. J. delivered the opinion of the Court. As to the first question, which relates to the publication of the supposed libel, we think the admitted facts, that it was at the request of the defendant inserted in a public newspaper printed in Providence, which, though in another State, borders on the county of Bristol, and that that paper usually circulates in the town of Rehoboth in that county, and that the number containing the libel was actually received and did circulate in that town, were competent and conclusive evidence of a publication in the county of Bristol. In this respect the case is like that of *Rex* v. *Burdett*, 4 Barn. & Ald. 95.[1]

As to that part of the instructions of the judge, which states that the malicious intent charged in the indictment (there being no evidence admitted to prove the truth of the facts alleged) was an inference of law, — this is certainly the common law doctrine, and it never has been repealed by any statute of this commonwealth, nor overruled by any decision of this Court; and if the doctrine be true, that the gist or essence of the offence of libel is, that it tends to provoke a breach of the peace, and this certainly is maintained in all the books, then it must follow, that when the publication complained of is of a libellous nature, it must be taken to be of a malicious character, unless the defendant shall within some of the known provisions of law be admitted to prove, and shall in fact prove, that the allegations made are true, and that he had some warrantable purpose, inconsistent with a malicious intent, in causing the publication.[2]

312 There are certain cases in which the defendant in a prosecution for a libel may acquit himself by showing an honest purpose and proving the truth of his allegations. The general principles upon which such a right depends, are stated in the case of *Commonwealth* v. *Clap*, 4 Mass. R. 168; though without doubt there are cases, other than those mentioned in

[1] See 1 Russell on Crimes, 240; Roscoe's Dig. Crim. Ev. 537, 2 Stark Ev. (5th Amer. ed) 455, 456; 3 Chitty on Crim. Law, (3d Amer. ed.) 872.

[2] See *Root* v. *King*, 7 Cowen, 613; *Dexter* v *Spear*, 4 Mason, 115; 3 Chitty on Crim. Law, (3d Amer. ed.) 867, 868, 875; 2 Stark. Ev. (5th Amer. ed.) 461; Roscoe's Dig. Crim. Ev. 536; 1 Russell on Crimes, 242, 243, *Erwin* v *Sumrow*, 1 Hawks, 472.

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the opinion of the Court in that case as illustrations of the general doctrine, in which the same principles will apply.

The law as laid down in the case above cited, has stood before the public nearly twenty years, and successive legislatures must be presumed to have acquiesced in its wisdom and policy, or it would have been altered by statute.

The general principle decided is, that it is immaterial to the character of a libel *as a public offence*, whether the matter of it be true or false; not, as some have affirmed, because the law makes no distinction between truth and falsehood, but because the interest of the public requires, that men not invested with authority by the laws, shall not usurp the power of public accusation, and arraign before the public, with malicious motives, their neighbours and fellow citizens, exposing them to partial trials in forms not warranted by the constitution or laws, and condemning them to a species of ignominy which is often a heavier punishment than the law would inflict for the offences or misconduct of which they are thus officiously accused. And surely so long as preventive justice shall be deemed more salutary than vindictive, all wise governments will hold it necessary to curb the disposition, always too prevalent, to excite ill temper and ill blood by exposing the offences, faults or foibles of men, who, if guilty of any violation of law, are amenable to punishment in the ordinary way, and if liable to censure for private vices, irregularities of temper or unaccommodating manners, should be left, as the law leaves them, to the corrections of conscience and those silent but powerful punishments which their misconduct itself will supply.

No state of society would be more deplorable than that which would admit an indiscriminate right in every citizen to arraign the conduct of every other, before the public, in newspapers, handbills or other modes of publication, not only for crimes, but for faults, foibles, deformities of mind or person, 313
even admitting all such allegations to be true. When the accusation is made by public bodies or officers whose duty it is by law to detect and prosecute offences, the charge and the investigation are submitted to, and no spirit of revenge is produced; but if private intermeddlers, assuming the character of reformers, should have the right to become public accusers,

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and when called to account, to defend themselves by breaking into the circle of friends, families, children and domestics, to prove the existence of errors or faults which may have been overlooked or forgiven where they were most injurious, the man who is thus accused without lawful process might be expected to avenge himself by unlawful means, and duels or assassinations would be the common occurrences of the times. Instances are recollected where violence, and even death, has ensued from such proceedings. It was with a wise regard to these evils, that the common law has put a check upon the *licentiousness* of the press, and the expression of opinion by writing, painting, &c. when the effect and object is to blacken the character of any one, or to disturb his comfort, the public good not being the end and purpose of such publication, or if that is professed, the public peace requiring a different mode of accusation.

Nor does our constitution or declaration of rights abrogate the common law in this respect, as some have insisted. The 16th article declares, that "the liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth." The *liberty* of the press, not its *licentiousness*; this is the construction which a just regard to the other parts of that instrument, and to the wisdom of those who formed it, requires. In the 11th article it is declared, that every "subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or *character*." And thus the general declaration in the 16th article is qualified. Besides, it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous* 314 *restraints* upon publications as had been practised by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction.[1]

[1] *Dexter* v. *Spear*, 4 Mason, 115.

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The common law therefore is left unimpaired by the constitution, except as will hereafter be stated, and by that law, unquestionably, the propagator of written or printed tales to the essential prejudice of any one in his estate or reputation, is a public offender, and is not allowed to excuse himself by the additional wrong of proving in a court of justice, in a collateral way, the facts which he has unwarrantably promulgated.[2]

And yet there are some exceptions to this general rule, recognised by the common law; and others, which are rendered necessary by the principles of our government.

These exceptions are all founded in regard to certain public interests, which are of more importance than the character or tranquillity of any individual. All proceedings in legislative assemblies, whether by speech, written documents or otherwise, are protected from scrutiny elsewhere than in those bodies themselves, because it is essential to the maintenance of public liberty, that in such assemblies the tongue and the press should be wholly unshackled. So proceedings in courts of justice, in which the reputation of individuals may be involved, are to be free from future animadversions, because the investigation of right demands the utmost latitude of inquiry, and men ought not to be deterred from prosecuting or defending there by fear of punishment or damages. Yet in *these* instances, if this necessary indulgence is abused for malicious purposes, a pretence only being made of the forms of legislative or judicial process, the party so conducting himself is amenable to the law. The right also of complaining to any public constituted body, of the malversation or oppressive conduct of any of its officers or agents, with a view to redress for actual wrong, or the removal of an unfaithful officer, may be justified, because the case will 315
show that the proceeding does not arise from malicious motives, or if it does, because the common interest requires that such representations should be free. And there are cases of mere private import, such as an honest though mistaken character of a servant, which, when requested by any one having an interest, the law considers innocent. These cases are all provided for

[2] See Roscoe's Dig. Crim. Ev. (Amer. ed.) 539, n. 1; 2 Stark. Ev. (5th Amer. ed.) 472; 1 Russell on Crimes, 211; 3 Chitty on Crim. Law, (3d Amer. ed.) 866, and notes.

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by the common law, and they go far to render harmless that much decried rule, that the truth is no defence in a prosecution for libel. *Rex* v. *Wright*, 8 T. R. 293; *Rex* v. *Creevey*, 1 Maule & Selw. 273; *Lake* v. *King*, 1 Saund. 131; *Astley* v. *Younge*, 2 Burr. 807; *Rogers* v. *Clifton*, 3 Bos. & Pul. 587; Esp. Dig. (3d ed.) 505; *Thorn* v. *Blanchard*, 5 Johns. R. 508; *Rex* v. *Fisher*, 2 Campb. 563; Starkie on Slander, *c.* 11.

That by the common law always, so far as it can be traced back, the doctrine as now mentioned in regard to excluding the truth of the matters alleged, as a defence in a public prosecution for libel, with the exceptions stated, has been recognised and enforced, will be denied by no lawyer who has thoroughly examined the subject. *De Libellis Famosis*, 5 Co. 125; 4 Bl. Com. 150. Indeed it has always been objected as one of the imperfections of that system, by those who have chosen to question its title to veneration. But like most other principles of the common law, it is founded in common sense and common justice, and is not peculiar to that system, for it prevails in the civil law, and indeed the code of no civilized country would repudiate it. It may be altered, or, as may be thought, mitigated by legislative enactments in some States, but this very legislative interference is grounded upon the existence of the principle at common law. If any reformation therefore is wanted, which under the judicial expositions in this commonwealth may well be doubted, none but the legislature is competent to make it.[1]

[1] Immediately after this decision the legislature enacted, that in every prosecution for writing or for publishing a libel, the defendant may give in evidence in his defence, upon the trial, the truth of the matter contained in the publication charged as libellous, provided that such evidence shall not be deemed a sufficient justification, unless it shall be further made to appear, on the trial, that the matter charged to be libellous was published with good motives and for justifiable ends. St. 1826, *c.* 107, § 1; [Revised Stat. *c.* 133, § 6.]

So in Connecticut, New York and some other of the States, the truth of the supposed libellous matter may be given in evidence in public prosecutions, by virtue of the constitutions of some, and the statutes of others, made for that purpose, subject to different degrees of limitation. See constitution of New York, Art. 7, § 8; 1 Revised Stat. of New York, 94; 1 Russell on Crimes, 209, n. *a*; 2 Stark. Evid. (5th Amer. ed.) 472, n. (1).

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For a very sensible, learned and manly discussion of this subject, I refer to the opinion of the Court of Appeals in South Carolina, delivered by *Waties* J. in the case of *The State* v. *Lehre*, published in 4 Hall's Law Journ. 48. The doctrine so laid down had the sanction of the intelligent bar of the State.

The truth is, that the rule, with the exceptions stated, has never been complained of, except when applied to prosecutions for libel of political bearing and character. In such prosecutions the passions of men are always much inflamed, and there is a desire on one side or the other to break through those wholesome restraints which the law has devised for the protection of private character and the preservation of the public peace. An attack upon public men, even in regard to their private characters, has been viewed as a right growing out of our free institutions and essential to the support of them. And so far forth as this notion is correct and salutary, it has been incorporated into our law, and serves to form an exception to the general rule, not distinctly admitted by the common law, though not at all inconsistent with its general character. The case of *Commonwealth* v. *Clap* was the first, since the adoption of the constitution, which called for a discussion of these principles, and in that case it is very clearly and distinctly settled, that if the *truth only* is told of public elective officers, or of acknowledged candidates for offices, in a decent manner and with a view properly to influence an election, it is justifiable.[1] For the reasons upon which that doctrine is founded, we refer to the case above cited. The force of them will not be disputed. 316

But there are certain other cases not yet distinctly adjudicated upon, where the truth of charges is a legitimate ground of defence, by clear inference from principles recognised by the common law and our own tribunals.

In *Commonwealth* v. *Clap*, it is stated, "that a man may apply by complaint to the legislature to remove an unworthy

[1] See *King* v. *Root*, 4 Wendell, 113; *Thomas* v. *Crosswell*, 7 Johns. R. 264, 3 Chitty on Crim Law (3d Amer. ed.) 868, notes.

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officer ; and if the complaint be true, and made with the honest intention of giving useful information, and not maliciously, or with intent to defame, the complaint will not be a libel "

This is put for illustration of the principle, not to exhibit the only instance in which it is to be applied. A complaint to the *executive* against an officer holding his place at its pleasure, — to a court against an officer whom they have the power
317 to dismiss, — to any body of men having power over its officers, — the subject of the complaint being of a public nature, or the person complaining having a particular interest in it, — falls within the same principle

Thus if a minister of the gospel should be guilty of gross immoralities, and one of his parish should complain to the church in order that an inquiry might be instituted ; or if a *candidate* for the ministry should from vicious habits be unfit for the station he seeks ; since all are interested in the purity of the ministerial character, information to those whose duty it is to determine his qualifications, would not be libellous, if communicated in a spirit of truth and candor. Various other cases might be put, in which if it appeared that the purpose was sincere and upright, and wholly free from malice, the truth of the facts stated would be a good defence. But in all such cases, the information is to be given to those who have a right to act upon it, and whose interest and duty are concerned in it ;[2] for a promiscuous promulgation of the same facts would of itself be the strongest evidence of malice, and in such cases the court must judge whether the occasion is a fit and proper one for the admission of such defence, and the jury must determine the motives and the end.

With this exposition of the law of libel in this common wealth, in which we are warranted by the common law, by the constitution, and by judicial decisions, there seems to be no reason for complaint against that general rule, which is so often the theme of popular declamation. A further relaxation can scarcely take place without involving the community, fam-

[1] 3 Chitty on Crim. Law, (3d Amer. ed.) 870, notes ; Roscoe's Dig Crim Ev. 538 to 540 ; 1 Russell on Crimes, 231, 232.

[2] See *Remington* v. *Congdon*, 2 Pick. (2d ed.) 315, n. 1.

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lies and individuals, in those contentions and acrimonious conflicts which will render the social state little, if at all, better than the savage.

The principal difference between the common law, as admitted here, and the statute provisions of the State of New York, is, that *there* the jury are to judge of the occasion, as well as the motives and ends of the publication; whereas, with us, it must appear first to the court that the case is a proper one for the admission of the truth in evidence. The difficulty with the New York system is, that in every prosecution for a libel, whether of a public or a private nature, the whole matter must be made the subject of open investigation; 318
so that a man's whole domestic relations may be brought before the public, in order to ascertain whether the motives of the alleged libeller were good and his end justifiable; whereas our system proceeds on the ground that private individuals have nothing to do with the conduct of their neighbours, as it may affect the public, unless they proceed in due course of legal process against them in some tribunal, where, instead of being crushed by public opinion factitiously made up on newspaper paragraphs, they will have full opportunity to vindicate their innocence, or if guilty, meet only the punishment which the law has awarded for their offence. If the public sentiment in this commonwealth is in favor of a more relaxed system, the power is in the hands of the legislature, which can mould the law at its pleasure.

Having thus attempted to vindicate the law of libel, as established in this commonwealth, from the aspersions which are frequently cast upon it, we will consider its application to the case before us, in order to determine whether, upon either of the grounds assumed, a new trial ought to be granted.

The first ground, to wit, the want of legal proof that the libel was published, as alleged, within the county of Bristol, has been considered and overruled; as has also the objection to the charge to the jury.

The other objection, which opens the general question, is that the judge refused to admit in evidence the inquisition which is alluded to in the publication, and with a view to prove the truth of the facts therein stated. Had the inquisition been

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published without any defamatory comment, it certainly would not have furnished ground for this prosecution; for it does not of itself contain any libellous matter, and it is in the nature of a judicial inquiry, the publication of which would not be criminal, unaccompanied by direct proof of malice. The inquisition merely states that a deceased stranger, who was found dead in a tavern kept by Fowler, came to his death by intoxication. Now this may be true, without any implication against
319 Fowler, for every innholder is liable to have drunken people come to his house, and if they die there, he may be entirely innocent of the cause of their death. But the remarks made by the defendant charge Fowler with having administered the *liquid poison*, and thus being the cause of the death of the stranger; and the public are warned against resorting to the house where such practice is allowed, and the municipal authorities are invoked to exert their power by taking away or withholding the license of Fowler to keep a public house. The matter of this publication is certainly libellous, as it insinuates gross misconduct against Fowler, and directly charges him with a violation of his duty, and exposes him to the loss of his livelihood, so far as that depends upon the reputation of his inn for regularity and order. Admitting the account of the inquisition to be correct as published, yet the addition of comments and insinuations tending to asperse Fowler's character renders it libellous. *Thomas* v. *Croswell*, 7 Johns. R. 264.[1]

But it is said, that this is a matter of public concern, and that the defendant was impelled by a sense of public duty to warn travellers and others from a house which was thus deservedly stigmatized. The answer is, that the defendant did not select a proper vehicle for the communication. The natural effect of a publication of this sort in a newspaper, is, to procure a condemnation in the public mind of the party accused, and his punishment, by bringing his house into disrepute, without any opportunity of defence on his part; so that the accuser

[1] Roscoe's Dig. Crim. Ev. (Amer. ed.) 540, and note; 3 Chitty on Crim. Law, (3d Amer. ed.) 870, notes; *Clark* v. *Binney*, 2 Pick. (2nd ed.) 113, 117, n. 2; *Flint* v. *Pike*, 4 Barn. & Cressw. 473; *Roberts* v. *Brown*, 10 Bingh. 519; *Saunders* v. *Mills*, 6 Bingh. 213; *State* v. *Lehre*, 2 Constitutional Rep. 809, 819; *Heyward* v. *Cuthbert*, 4 M'Cord, 354

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becomes judge and executioner at one stroke, and his purpose, if a malicious one, is answered, without any means of relief; for the mischief to the person libelled would be quite as great if he were innocent as if he were guilty. If it should be said in answer, that all this is right if the allegation be true, and if not true, he may recover his damages in an action of slander, it may justly be replied, that this remedy is uncertain and incomplete; for in many cases the slanderer will be unable to respond in damages, and the suffering party will be subjected to the additional injury of a troublesome and expensive lawsuit with little or no hope of recompense.

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There may be cases where (there being no other mode by which great mischief can be warded off from the public) a newspaper communication, made with the sole view of preserving the citizens from injury to their life or health, would be justifiable. Such might be the case of an apothecary selling and distributing poison in the form of medicine, stated by a distinguished member of the late convention for revising the constitution. This is an extreme case, where to delay information until the forms of law should be pursued might endanger the lives of hundreds, and such a case would be a law to itself; the public safety being the supreme law, and it being every citizen's duty to give warning in such cases. There may be cases of gross swindling, where nothing but immediate notice would secure the public against depredation, which would be governed by the same principle.

But in the case before us there was no such urgent necessity. The statute regulating licensed houses provides the restrictions and the punishment which the legislature has thought adequate to the offences of the nature contained in this libel. For suffering excessive drinking in his house, the innkeeper is subject to a penalty. For a second offence, he is to be put under bond for good behaviour, in addition to a pecuniary mulct. For a third, he is to forfeit his license and shall be disqualified to keep a public house for two years. And besides all this, if his misconduct is continued, so as to constitute his house disorderly, or so that he violates the law for regulating it, he forfeits the penalty of his recognizance. Other guards and securities are provided in the statute, to pre-

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vent the abuse of the license, and a complaint may be made to the selectmen, to a justice of the peace, or to a grand jury, by any person who has knowledge of such offences, without incurring the risk of a prosecution for libel. There was then no necessity for this newspaper publication, and the defendant, by resorting to it, has taken the law into his own hands unwarrantably, instead of resorting to those tribunals which the laws have constituted for the correction of these offences. This then is a case in which the defendant cannot
121 be allowed to excuse himself by showing the truth of the accusation which he has unjustifiably made. He had no right to arraign the prosecutor before the public in the form which he adopted, and thus destroy the reputation of his house, without leaving him any means of showing his innocence of the charges made against him. The occasion was not a proper one for a newspaper denunciation.

Motion for new trial overruled

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF NORFOLK, OCTOBER TERM 1825, AT DEDHAM

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, } JUSTICES.
HON. SAMUEL S. WILDE, }

BENJAMIN FISHER, Treasurer &c., *versus* ISAAC ELLIS, Executor &c.

Several inhabitants of a parish signed a subscription paper, binding themselves to pay or give their notes for the sums affixed to their names to the parish treasurer, to constitute a fund, which was to be managed by the settled minister, treasurer and parish committee as a board of trustees, and the income to be devoted for ever to the annual support of a minister. The parish voted to accept the donations. The defendant, pursuant to the terms of the subscription paper, gave his promissory note, in which he acknowledged that he had borrowed and received the sum subscribed by him of the parish treasurer, and promised to repay the same to such treasurer or his successor, according to the conditions of the donation, with interest annually, and for several years did pay the interest. *Held*, that a sufficient consideration for the promise was stated in the note, which the defendant could not contradict; that the parish might maintain an action on such note in the name of the treasurer for the time being; and that the trustees, in case of their neglect, might be compelled by a bill in chancery to appropriate the fund according to the intention of the donors.

ASSUMPSIT, brought by the treasurer of the third parish in Dedham, upon the following promissory note signed by Oliver Ellis, the defendant's testator, viz.: — "Dedham, June 1st, 1811. Borrowed and received of Willard Gay, Esquire,

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Fisher v. Ellis.

treasurer of the third parish in Dedham, seventy-five dollars, which sum I promise to repay him or his successor in said office, according to the conditions of a donation made to said parish, and accepted by them by a vote passed May 30th, 1811, and recorded in the parish book of records, reference thereto being had, with interest on the first day of March annually."

The conditions referred to were contained in a subscription paper, dated April 18th, 1811, by which forty-two persons agreed to pay the several sums affixed to their names, (75 dollars being affixed to that of O. Ellis,) to the treasurer of the third parish in Dedham. Among other things, it was stipulated that the sums subscribed should be placed at interest, and the interest devoted for ever to the annual support of a gospel minister of the congregational denomination; that any subscriber should be entitled to the loan of the sum subscribed by him, by giving his note therefor to the parish treasurer and paying the interest annually; but that if such subscriber should neglect to pay the interest for the space of thirty days after it should fall due, it should be the duty of the trustees hereafter mentioned forthwith to compel payment of the principal sum; that the settled minister, the parish treasurer, and parish committee, should be a board of trustees to manage the fund, and to have the entire control of it, subject to the conditions of the donation; that in case the parish should misapply the fund, or place the house of worship at a greater distance than fifty rods from where it then stood, or should be destitute of a settled minister for the space of six years, it should be liable to repay to the donors or their representatives the sums subscribed; and that the proprietors, should a majority of them think best, might within two years get incorporated, and might vary the mode of managing the fund, but not the application of it.

In May 1811, O. Ellis made the note declared on, the interest on which he paid during his life. No other consideration was received by him than what is expressed in the subscription paper. A vote of the parish was passed in May 1811, accepting the donation according to the conditions of
324 the subscription paper, and another vote ordering that instrument to be inserted in the parish records; and since then the

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board of trustees have had the control of this note and of the rest of the fund, and have complied with the requisitions of the subscription paper. Some of the subscribers paid money, and others gave notes similar to the one declared on, and have paid the interest annually.

In the Court of Common Pleas the defendant objected to the reading of the note to the jury, because the plaintiff had no legal interest in it, and was not a party to it. He also objected to the reading of the parish records, because the parish was neither a party to the contract declared on, nor could it assume the obligations which seemed to be intended by the recorded votes. He further objected that there was no legal consideration for the note. And lastly, he objected to the whole proceedings in creating and managing the fund, because no party had promised to accept and appropriate it according to the intention of the donors. But *Williams* J. overruled all these objections and ruled that the parish might sustain the action in the name of their present treasurer, and directed the jury to find for the plaintiff. Whereupon the defendant filed his exceptions.

Worthington in support of the exceptions. The promise was void for want of a consideration. *Boutelle* v. *Cowdin*, 9 Mass. R. 254 ; *Limerick Academy* v. *Davis*, 11 Mass. R. 113 ; Yelv. 41, Metcalf's note. There was no mutuality of promise ; no promise of any party to perform the conditions of the subscription paper. *Essex Turn. Corp.* v. *Collins*, 8 Mass. R. 292 ; *New Bedford Turn. Corp.* v. *Adams*, ibid. 138. The legal estate was in the trustees and the parish was only the *cestui que trust* ; but neither the trustees nor the parish made any such promise. The promise to refund in certain cases was made without authority ; a parish cannot bind itself for future years in regard to the support of public worship. The trustees had the control of the fund, and the action is improperly brought by the parish treasurer. Oct. 25th.

Richardson and *Metcalf*, *contrà*. The promise was founded on a legal consideration. The parishioners were under a legal obligation to support public worship, and this fund would cause a diminution of their taxes. One promise is a good consideration for another, and here the parish, by accepting the donation, 325

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promised to comply with the conditions of the subscription paper. *M'Auley* v. *Billenger*, 20 Johns. R. 89; *Religious Society* v. *Stone*, 7 Johns. R. 112.

The note contains an acknowledgment of value having been received, which cannot be contradicted, no fraud nor failure of consideration being proved. 2 Stark. on Evid. 280; *Bowers* v. *Hurd*, 10 Mass. R. 427.

It would be a fraud on third persons, not to enforce this contract. Several have paid the sums subscribed by them, led on by the defendant's testator, who paid the interest on this note during his life. *Holmes* v. *Dana*, 12 Mass. R. 190; *Goodrich* v. *Gordon*, 15 Johns. R. 6; *Coolidge* v. *Payson*, 2 Wheat. 66; *Farmington Academy* v. *Allen*, 14 Mass. R. 172.

Worthington in reply. The case of an acknowledgment of value received in negotiable notes is not applicable. This note refers to the subscription paper, and both are to be taken as one transaction, and it thus appears that the money had never been paid to the promisor.

Oct. 28th. PARKER C. J. delivered the opinion of the Court. We are not able to perceive any sufficient reason against the plaintiff's recovering in the present action. The promise is made to the third parish in Dedham, through their treasurer, and it is expressly made to the successors in that office. The parish is a legally existing body, having a right to hold funds, and to be a debtor or creditor. The present plaintiff is the lawful successor of him to whom the promise was immediately made. There is then no objection to the character or capacity of the plaintiff. A promise made to A, for the benefit of B, may be sued by A or B. Com. Dig. *Action &c. upon Assumpsit, E.*[1]

We think it cannot be objected that there was no consideration for this promise. The defendant's testator acknowledged a consideration, to wit, that he had borrowed and received the sum of money which he promised to pay. Taking the words of the writing on which the action is brought, it would

[1] See *Levant* v. *Parks*, 1 Fairfield, 441; 1 Chitty on Pl. (6th Amer ed.) 5 *Potter* v. *Yale College*, 8 Connect. R. 60.

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appear that he had received 75 dollars from the treasurer of the parish on loan, and he would not be allowed to contradict this admission.[1] By the form of the transaction it seems to have been intended to be understood, that the testator had actually paid his subscription into the treasury, and then taken it out again on loan. Surely if he had paid the money, he could not recover it back again; neither can he, having by his own acknowledgment borrowed it, refuse to repay it in violation of his promise. It is the same thing as if the sum borrowed had been money paid by any other subscriber. It is unlike the cases cited by the defendant's counsel, for in those, in addition to the objection of want of parties, there was thought to be no mutuality; but here, taking the promisor's own acknowledgment, he had received a full consideration for his promise.

Nor is there a defect of remedy, in case the trustees should not apply the proceeds of the fund according to the conditions on which it was created; for without doubt, on a bill in equity filed by the parish, or perhaps by any of the individual subscribers interested at the time in the fund, they would be compelled to execute their trust; and if the parish itself should refuse or neglect to cause the fund to be appropriated according to the terms of the subscription, the subscribers or their representatives would have a right to recover the sums they may have advanced.

Judgment affirmed.

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[1] See *Hill* v. *Buckminster*, 5 Pick. 391; *Barker* v. *Prentiss*, 6 Mass. R. 434; *People* v. *Howell*, 4 Johns. R. 303; *Pearson* v. *Pearson*, 7 Johns. R. 26; *Schoonmaker* v. *Roosa*, 17 Johns. R. 301; *Holliday* v. *Atkinson*, 8 Dewl. and Ryl. 163; *S. C.* 5 Barn. & Cressw. 501; 2 Stark. Evid. (5th Amer. ed.) 169, 170; *Bowers* v. *Hurd*, 10 Mass. R. (Rand's ed.) 430, n. (*a.*); *Phillips Limerick Academy* v. *Davis*, 11 Mass. R. (Rand's ed.) 119, n. (*a.*); *Williams College* v. *Danforth*, 12 Pick. 541; *Reid* v. *Furnival*, 1 Crompt. & Mees. 538.

Although a promissory note is expressed to be for value received, or contains any other acknowledgment of consideration, parol evidence is admissible, between the original parties, to prove that there was in fact no consideration. *Mills* v. *Wyman*, 3 Pick. 207; *Amherst Academy* v. *Cowls*, 6 Pick. 427 *Hill* v. *Buckminster*, 5 Pick. 391.

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COMMONWEALTH *versus* WORCESTER TURNPIKE CORPORATION.

A turnpike road may be laid out over an old county or town road; and the turnpike corporation's receiving toll for the road so laid out, is conclusive evidence of their being bound to keep it in repair; so that they cannot object that it was never accepted as a turnpike road, or that it is not of the width required by law.

So far as it regards the public, an agreement by the town in which such road lies, to keep it in repair, will not release the turnpike corporation from their obligation in that respect.

THIS was an indictment against the defendants for not repairing an ancient highway, alleged to be a part of their turnpike road, in the town of Roxbury

At the trial, before *Wilde* J., it was proved, that by *St.* 1805, *c.* 67, the defendants were authorized to make and keep in repair a turnpike road from Roxbury to Worcester, and that a committee named in the statute were empowered to locate, view and accept the same, when completed to their satisfaction; that the committee did locate the road over the ancient highway mentioned, alleging it to be four rods wide, and made a report of the location to the Court of Common Pleas in 1808, which report was accepted. It was also said by the defendants' counsel, and not denied on the part of the commonwealth, that all of the road had been made and accepted, except a part which lies in the county of Norfolk, and that gates had been erected by authority of the committee on the parts which they had accepted, one of which was situated in Brookline about a mile to the westward of the ancient highway; but there was no direct evidence as to the acceptance of any part of the road.

The defendants contended, that as the part of the old road over which the committee had located the turnpike road, had never been accepted as a part of the turnpike road, they were not bound to repair it. They offered to prove that it was not the original intention of the corporation to have the turnpike road pass over the old road; but that the selectmen of Roxbury met the turnpike directors and the committee, and alleging that great advantage would accrue to the town by means of the travel, if the turnpike road should be so located

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as to pass through their principal street, assured the directors that the inhabitants of the town would for ever maintain the road as they had done ; and that upon this understanding and compromise it was agreed, that the location, as a matter of form, should be made over a part of the town's road. They also offered to prove, that the town did continue to keep this part in repair from the time of the location in 1808 until 1821 ; and that the turnpike corporation had never made this part of the road, nor paid the owners of the land over which it was located, nor taken toll for it, nor exercised any control over it ; all which was held by the judge to be immaterial.

The defendants did prove that this old road, alleged by the locating committee to be four rods wide, is in fact but three, for most of the distance, and, in some places, less than two, that the walls on each side, for most of the distance, have been the same for more than forty years ; and that at the time when the committee were passing over the road, it was measured by a sworn surveyor, and the committee declared it was not four rods wide, but as it was not intended to be a part of the turnpike road, it was of no consequence.

A verdict was taken against the defendants ; and if the Court should be of opinion that the way described in the indictment is a part of the turnpike road, and that the evidence rejected was not admissible, the verdict was to stand ; otherwise a new trial was to be granted.

Harrington for the defendants. An ancient highway cannot be adopted as part of a turnpike road ; except where the roads cross, in respect to which the statute makes an express provision. To constitute a turnpike road there must be a power to stop a passenger who refuses to pay toll, but *St.* 1804, *c.* 125, § 3, enacts, that no gate shall be erected on any county or town road before established. But if the two roads may concur, the town still continues liable to repair ; at least it is equitable that the expense of repairing should be apportioned between the town and the turnpike corporation. 1 Russell on Crimes, 486 ; *Rex* v. *Chattesworth*, 2 East, 413. The road in question is not a part of the turnpike road, because the requisitions of the turnpike act have not been complied with. It is not four rods wide ; the land has never been

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paid for; *Callender* v. *Marsh*, 1 Pick. 431; and it has never been accepted by the locating committee. Until it is accepted, an indictment will not lie for not keeping it in repair. The *St.* 1804, *c.* 125, § 3, provides, that the gates on a turnpike road shall be ten miles from each other, but not that toll for ten miles shall be received at each gate; so that although there are four gates on this turnpike road, which is not quite forty miles in length, it does not follow that toll was taken for the road described in the indictment; and in fact the gates were established without any reference to it.

Morton (Attorney-General) and *Metcalf*, for the common wealth, cited *St.* 1808, *c.* 15, and *c.* 71; *Rex* v. *Llandilo Roads*, 2 T. R. 232; 2 N. Hamp. R. 22; *Rex* v. *St. George Hanover Sq.* 3 Campb. 222.

Oct. 28th. PARKER C. J. delivered the opinion of the Court. The first objection is, that part of the road complained of is in fact no part of the turnpike road which is to be kept in repair at the charge of the corporation, because it is an ancient road heretofore laid out, pursuant to law, as a public highway, and a turnpike road cannot by law be laid out over such a way. But there is no prohibition in the statute, and the provision that no gate shall be erected on a part of a turnpike road which is an old road, is grounded upon the supposition that a turnpike road may be so laid out, the object of the legislature being to prevent a tax upon travellers for passing on a road already in existence.

We do not think that the corporation can object that this part of the road has never been so made as to be accepted. They have established their gates and have taken toll for many years, and part of the toll so taken is considered by law as a compensation for making this part of the road. They surely cannot, by neglecting their duty, exempt themselves from the penalty prescribed by law for this very neglect.

Upon the return of the committee appointed by the legislature in the act of incorporation, locating the road pursuant to
330 the act, it becomes a turnpike road, as a county road becomes such by the acceptance of the return of the committee appointed by the court of sessions, and a duty devolved upon the corporation to make the road convenient for passengers

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Whether indictable or not before they are allowed to receive toll, need not now be determined. But after they have undertaken to erect their gates and to receive toll, they are liable to the charge of keeping the road in repair.

It is not for them to object that the road as made has never been accepted, for that would be to aver their own wrong or negligence in excuse for the omission of a duty. The fact of r iving toll is, as to them, conclusive evidence of their liability for repairs.

We think the evidence which was offered to prove that the town of Roxbury had agreed that so much of the road as lies in Roxbury should remain at the charge of the town, and that the same was in fact kept in repair by the town from the time when the turnpike road was made until the year 1820, was irrelevant. A bargain between the two corporations could not release either from its obligation to the public. It is an affair to be settled between themselves. It having been heretofore decided that the town of Roxbury was released from the maintenance of this road by the establishment of the turnpike road,[1] it follows necessarily that their previous duty was transferred to the turnpike corporation.

That the statute of 1804, *c.* 125, [See Revised Stat. *c.* 39, § 5,] requires that turnpike roads shall be not less than four rods wide, and that the part of the road complained of is only three rods wide, does not show that the location is void. It shows that the legislative committee reported it to be of the proper width, and their report was accepted. This mistake or deception, whichever it may be, cannot operate to discharge the corporation from the expense of making and maintaining the road. Perhaps, on a *quo warranto* at the instance of the government, the franchise would be vacated ; but while the road practically remains, having been located and accepted in the manner prescribed, it must be regarded as such by the Court.

Judgment on the verdict.

[1] *Roxbury* v. *Worcester Turn. Corp* , 2 Pick. 41 ; *State* v. *Hampton*, 2 N. Hamp. R. 22. See 1 Russell on Crimes, 320, 321 ; *Rex* v. *Nethertong*, 2 Barn & Ald. 179.

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WILLIAM PRESCOTT *versus* EBENEZER N. PETTEE *et al.*

An execution levied on land must be returned into the clerk's office in order to complete the title of the creditor; but if it has been returned before it is offered in evidence of such title, although after the return day, it will be sufficient.

THIS action, which was a *writ of entry*, came before the Court upon a case stated.

On the 19th of June, 1822, Wild, one of the tenants, caused the demanded premises to be attached on a writ, which he sued out of the Boston Court of Common Pleas for the county of Suffolk, against one Fisher. He recovered a judgment thereon at October term 1823 of that court, and within thirty days after the rendition of the judgment extended his execution on the land attached. The execution, with the officer's doings thereon, was duly recorded in the registry of deeds on the 28th of February, 1824, within three months from the time of the extent, but it was not returned to the Court of Common Pleas next thereafter holden for the county of Suffolk, nor into the clerk's office, until the 1st of June, 1824, which was after the court had adjourned without day.

The demandant claimed under a deed of mortgage made by Fisher on the 23d of September, 1823, which was duly acknowledged and recorded. It was agreed that the parties might offer evidence to the Court to show that the mortgager and the mortgagee, at the time of making the deed of mortgage, had or had not notice of the attachment.

The judgment was to be for the demandant, or for the tenants, according as the opinion of the Court should be upon these facts.

The case depended upon the construction to be given to *St.* 1783, *c.* 57, § 2, [Revised Stat. *c.* 73, § 17,] which, after prescribing the mode of extending executions, says, "which execution, being returned with the doings thereon into the clerk's office, and before such return into the clerk's office or afterwards, and within three months, the same shall be recorded in the registry of deeds in the county where the land lays, shall make as good title to such creditor &c. as the debtor had therein."

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Metcalf for the plaintiff. A title under an extent is a statute title, and the requirements of the statute must be strictly complied with. The execution must be returned into the clerk's office; *Ladd* v. *Blunt*, 4 Mass. R. 402; *Sullivan* v. *M'Kean*, 1 N. Hamp. R. 371; and it must be returned at the return day, or at most, (as where the officer has not then had time to complete the service,) within a reasonable time after. *Prescott* v. *Wright*, 6 Mass. R. 20; *Tobey* v. *Leonard* 15 Mass. R. 200; *Waterhouse* v. *Waite*, 11 Mass. R. 207 Most of the cases which have a bearing on the present question were actions of debt on judgment by the creditor against the debtor, as between whom the title might be good, when it would not avail against a person claiming, like the demandant, by an intervening title. *M'Lellan* v. *Whitney*, 15 Mass. R. 137; *Lawrence* v. *Pond*, 17 Mass. R. 433; *Gorham* v. *Blazo*, 2 Greenl. 232. The argument *ab inconvenienti* is strong to show that the execution must be returned according to its precept; for if it is not registered within the three months, when is it to be, with safety to the creditor? The officer would be liable for nominal damages at least for neglecting to make such return.

The *Chief Justice* said the question appeared to be, whether a return of the execution into the clerk's office, according to its precept, was not a condition precedent to complete the title; so that the question of notice did not seem to be important.

A. Townsend for the tenants.

Suffolk, March 28th, 1826.

PARKER C. J. delivered the opinion of the Court. The tenants' title is the elder one, and has therefore the preference in law, unless by reason of the execution's not being returned into the clerk's office more seasonably their title is defeated and the subsequent conveyance by Fisher is let in; so that we are brought to the consideration of the words of the statute, which seem to require a return of the execution into the clerk's office at some time or other, in order to complete the judgment creditor's title.

We think it very clear that it is not required by the words of S. 1783, *c.* 57, § 2, [Revised Stat. *c.* 73, § 17,] that the

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execution shall be returned into court, or into the clerk's office, during the sitting of the court to which, by the words of the precept, it is returnable, for it need not be returned until after it has been recorded in the registry, and that may be done at any time within ninety days from the time of the levy; and the levy, if begun on the day before the sitting of the court, may be proceeded in and completed, so that it cannot be returned according to the words of the precept.

It is difficult to arrive at the meaning of the legislature in regard to the return of the execution into the clerk's office. No time is fixed, as in the case of recording, and it seems not to be very material, in regard to the interests of any, that the execution should be so returned. All the purpose of notice is answered by the registry in the place where all other conveyances of real estate are to be found. Still we are not at liberty to reject the words as wholly unmeaning, though we must take care not to give greater force to them than was intended by the legislature, or has been practically understood.

It may help us to a right construction, to consider how the law stood before the passing of this statute. A colonial law of 1675 (Anc. Chart. &c. 143) declares, that in case of houses or lands taken upon execution, it concerns the person or persons to whom the execution is delivered, to see it duly recorded, which being done, shall be a legal assurance of such houses, &c. This recording was no doubt to be in the office of the clerk of the court from which the execution issued, there being either no register, or the clerk of the court acting as such, though it was not until 9 Will. 3 (Anc. Chart. &c. 305) that the clerk was by law the recording officer of deeds.

The provincial statute of 2 *Geo.* 1 (Anc. Chart. &c. 413) after providing for the manner of levying executions upon land, says, "which *being returned* and *recorded* shall be a good title to the creditor." No time is here fixed for returning or recording. It is probable the return must have been on the return day, and the recording in the course of business in the clerk's office. If so, we cannot suppose that an attachment or deed made between the return and the recording would intercept the judgment creditor's title. At this time

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there was a registry for deeds distinct from the clerk's office, but executions by which real estate had been taken, continued to be recorded in the clerk's office only.

In 6 *Geo.* 1 (Anc. Chart. &c. 424) another statute was passed on the same subject, and the words of this statute are, "which *being returned and recorded* in the clerk's office, out of which the same issued, shall" &c. Here again it may be asked, whether if seasonably returned but not recorded for a time, six months, or a year, the title would be defeated, however in such case the party would have done all that he could, and the delay would not be his fault.

In 8 & 9 *Geo.* 2 (Anc. Chart. &c. 502) another act was passed, which provided that "all executions that shall hereafter be levied on lands or tenements, and the proceedings thereon, shall &c., within three months after such levying, be entered in the office of the register of deeds for the county where such lands lie." Here it will be observed there is no provision for the return of the execution into the clerk's office; and as the next statute upon this subject is that now in force, this historical deduction will enable us probably to ascertain what was intended by the terms used by the legislature.

In the present statute they intended to require that execution titles should be recorded in the public registry. They meant to allow three months for this to be done, and they intended that the execution should not, as before, lie in the register's office, or perhaps be destroyed, but should be returned to its proper place. The words, *being returned into the clerk's office*, have the same meaning as the words before used, *being recorded*. No time was intended to be fixed; nor was it necessary, for the notice was to be from the register's office. It was little more than a direction what to do with the execution after it should be recorded.

But without doubt one who wishes to maintain a title upon a levy in court, must show that the execution had been returned. That an interval however has passed after the return day, when it had not been returned, if all the other proceedings are perfect, we think cannot destroy a title even as to a

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purchaser in the intermediate time, since by going to the registry of deeds he may ascertain how the title stands.[1]

Judgment for the tenants.

The President &c. of the DEDHAM BANK *versus* JABEZ CHICKERING *et al.*

The charter of a bank required the cashier to give bond with two sureties, to the satisfaction of the board of directors, for the faithful discharge of his duties. *Held*, that where the board, by a vote, approved of two persons as sureties in a bond to be given, and a bond was afterwards found in the possession of the president, duly executed by the cashier and such sureties, there was a sufficient acceptance of it by the corporation.

A person was elected cashier of a bank in March 1814, when it was first organized, and again in October 1814, 1815 and 1817, by directors chosen annually, and he continued to act as cashier from his first election until 1823, when he committed a breach of duty. *Held*, that a bond given by him with sureties upon his first election, for the faithful performance of his duties "so long as he should continue in said office," extended to this breach of duty, it not appearing, either in the bond itself, or in the charter, records or regulations of the bank, that the office of cashier was an annual office.

DEBT on a bond executed by Chickering as principal and by Jeremiah S. Boies and William Dean (since deceased) as sureties, for 20,000 dollars, dated the 15th of April, 1814, conditioned that Chickering "shall well and faithfully execute and perform all the duties of cashier of said Dedham Bank, to which office he has been duly appointed, without fraud, covin, concealment, neglect or delay, so long as he shall continue in said office; and when a successor shall be duly appointed, shall deliver up to him, on request by the proper authority, all books, papers and moneys, and every article and thing belonging to said bank under his care.

Chickering was defaulted.

Pleas by the defendant Boies, 1. *Non est factum:* — 2. A general performance by Chickering during his continuance in

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[1] See the provision made upon this head, in the Revised Stat. *c.* 73, § 18, 19, 20. See also *Welsh* v. *Ivy*, 13 Pick. 481; *Emerson* v. *Towle* 5 Greenl. 197.

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the office of cashier by virtue of the appointment mentioned in the condition.

Replication to the second plea, alleging his continuance in office from the 14th of April, 1814, to a day in November, 1823, and assigning for a breach of the condition, that on that day he fraudulently absconded without delivering up the books, papers, moneys, &c., entrusted to his care.

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Rejoinder, that he did not continue to be, and was not in the office of cashier by virtue of the appointment mentioned in the condition, until and at the time when he is alleged to have absconded ; and issue joined thereon.

At the trial the plaintiffs produced the bond, and the defendant admitted that it was signed and sealed at his house in Milton by Chickering and himself, and that Chickering carried it away with him. E. Fisher, formerly a clerk and now cashier of the bank, testified that he was applied to on behalf of Boies for a copy of the bond, and that upon application to the president of the bank he (Fisher) obtained from him the original bond. The witness produced a book purporting to be the records of the proceedings of the directors of the bank, and a number of books containing lists of notes &c. proposed for discount at the meetings of the directors, at the foot of which lists were records of several votes and proceedings of the directors ; and he testified that these were the only records of the doings of the directors of which he had any knowledge.

The following are all the entries in these books, which affect the questions in this case. First a record, without any date, at the head of the first page of one of the books, that Chickering made "oath that he would faithfully perform all the duties incumbent on him as cashier of the Dedham bank, and as secretary of the board of directors, so long as he shall continue in said offices." The second entry was, that at a meeting of the directors on the 25th of March, 1814, Chickering "was chosen cashier of the bank," and that it was "voted, that the cashier of the bank for the time being be secretary of the board of directors." The third, that at a meeting on the 3d of May, 1814, it was voted, "that Jeremiah S. Boies Esq of Milton, and Mr. William Dean of Dedham, be accepted as sufficient sureties in a bond to be given by the cashier for the

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faithful discharge of the duties of that office," and 'that the officers of the bank shall receive such compensation for their services as under all circumstances shall be reasonable." The fourth, "Oct. 7th, 1814. The board of directors chosen by the stockholders of the Dedham bank at their annual meeting on Monday last, met; when Willard Gay Esq. was reëlected president and Jabez Chickering was chosen cashier." The fifth, "Oct. 2, 1815. The board of directors chosen by the stockholders at their annual meeting this day met; when Willard Gay Esq. was reëlected president of the board and Jabez Chickering was appointed cashier." The sixth, "Oct. 10, 1817, voted and appointed Jabez Chickering cashier, with salary of 800 dollars."

The jury were instructed, that the possession and production of the bond by the proper officer of the corporation, were evidence from which they might presume a delivery; and that the legal operation of the bond extended to all the time in which Chickering held the office of cashier; and that he must be considered as continuing in office by virtue of his appointment mentioned in the bond, until he absconded in 1823.

A verdict was taken for the plaintiffs, subject to the opinion of the Court upon the questions arising out of these instructions.

Sept. 26th.

C. G. Loring for the defendant. 1. Under the general issue there was no evidence of the bond's being delivered to, and accepted by, the plaintiffs. In general a bond can be accepted by an aggregate corporation, only by a writing or vote, or by an agent duly authorized by writing or vote. *Essex Turnpike Corp.* v. *Collins*, 8 Mass. R. 298; *Hayden* v. *Middlesex Turnpike Corp.* 10 Mass. R. 397; *Hallowell &c. Bank* v. *Hamlin*, 14 Mass. R. 180. Here the act of incorporation (*St.* 1813, *c.* 175, referring to *St.* 1811, *c.* 84) provides, that "the cashier, before he enters on the duties of his office, shall give bond with two sureties, to the satisfaction of the directors, in a sum not less than 20,000 dollars, with conditions for the faithful discharge of the duties of his office."[1]

[1] See Revised Stat. *c.* 36, § 27, in which it is enacted, that in no case shall the bonds of a cashier of a bank be taken for a less sum than 20,000 dollars nor for a greater sum than 50,000 dollars.

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It would therefore not be necessary to call a meeting of all the stockholders to act upon the bond, but there ought to have been a meeting of the directors. The manner in which the corporation is to exercise its powers, being thus prescribed, is essential and must be strictly pursued. *Head* v. *Providence Ins. Co.* 2 Cranch, 127; *Beatty* v. *Marine Ins. Co.* 2 Johns. R. 109. The acceptance of the bond, partaking of the nature of a judicial as well as a ministerial act, required a vote of the board of directors. *Rex* v. *Forrest*, 3 T. R. 38; *Rex* v. *Hamstall Ridware*, ibid. 380. The assent of individual directors would not be binding on the corporation; *Hartford Bank* v. *Hart*, 3 Day, 491; *Waterbury* v. *Clark*, 4 Day, 198; and we say that the directors could not delegate to the president the power to assent. The vote to accept Boies and Dean as sureties was not an acceptance of the bond; it applied to a bond to be subsequently given, and could be nothing more than an agreement to accept. The case is the stronger, inasmuch as the bond in question contains things not required by the statute. In the act establishing the Bank of U. S. there is a clause like the one above quoted, and in the case of that bank against Dandridge and others, in the Circuit Court of U. S., it was held by *Marshall* C. J. that the acceptance of the cashier's bond ought to be by a vote of the board of directors. The case is now pending before the Supreme Court of the United States.[1]

2. The office of cashier was an annual office, and the votes of the directors show that they understood it to be such; otherwise, why did they make a reëlection? They themselves were chosen annually, and it is hardly to be supposed that they could invest the cashier with powers for a longer time. No one would become a surety, if he thought his responsibility would continue during the life of the cashier. If however the office was not an annual one, it was to be held during the pleasure of the directors, and when they elected Chickering a second time, he ceased to be in office under the first election. And in 1817 an essential alteration was made in the tenure of the office, the salary being then fixed at 800 dollars. On the

[1] See *United States Bank* v. *Dandridge*, 12 Wheat. 64, (6 Peters's Condensed U. States Ct R. 440.)

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ground that the office was either annual, or to be held during the pleasure of the directors, this bond did not extend to the acts of Chickering subsequent to his reëlection. *Arlington* v. *Merricke*, 2 Saund. 411; *Liverpool Waterworks Co.* v. *Atkinson*, 6 East, 507; *Wardens of St. Saviour's* v. *Bostock*, 2 New Rep. 175; *Hassell* v. *Long*, 2 Maule & Selw. 363; *United States* v. *Kirkpatrick*, 9 Wheat. 720; Bac. Abr. *Corporation*, *E*, 9.

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B. Gorham, *L. Shaw*, and *Richardson*, for the plaintiffs. 1. The bond being duly executed and in the possession of the persons to be benefited and not requiring any thing to be done on their part, is to be considered as accepted; and the burden is on the other party to show by affirmative evidence that it was delivered only as an escrow or with some other qualification. The law fixes the character of the bond to be given by a cashier, and the bond in suit was made conformably. Nothing was to be done by the directors but to approve of the sureties; and when they did this in respect to a bond to be given, they referred to the bond required by law. After they had voted that these sureties should be received, the acceptance of the bond was a mere ministerial act, which might be done by any one of the directors. It is clear that it was taken for the benefit of the corporation, and their subsequent assent to the act of their agents, which is manifested by bringing this action, is equivalent to an antecedent authority. *Monumoi Beach* v. *Rogers*, 1 Mass. R. 159. From the date of the bond compared with that of the vote, it might be presumed by a jury, that not only were the sureties approved by the directors, but that also the bond was exhibited to them and accepted.

2. The extent of the obligation of the surety was a matter of contract, and in binding himself for an indefinite period he relied on the integrity of the principal, and the probability that the obligee would not continue him in office when the surety would be likely to suffer from his misconduct. Upon a bond for the good behaviour of a person so long as he shall continue in office, the surety is responsible until the resignation or removal of the principal, except 1. where there is a recital limiting the term of office, as in *Arlington* v. *Merricke*, and *Stibbs*

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v. *Clough*, 1 Str. 227. — Or 2. where the term is limited by law, as in *St. Saviour's* v. *Bostock*, and *Bigelow* v. *Bridge*, 8 Mass. R. 275. In *United States* v. *Kirkpatrick* the court say that the office would have terminated at the end of a session of Congress, and that the second appointment was not a continuance of the first, because it was for a longer time, and 340
because the duties of the office were increased. In *Hassell* v. *Long* the question was whether the bond of a collector of taxes was so worded as to connect itself with a subsequent appointment, and the court, not finding the point clear, determined that it was limited to the first appointment. The office here was not by law an annual office, notwithstanding the cashier was chosen by annual officers. *Curling* v. *Chalklen*, 3 Maule & Selw. 502 ; *Anderson* v. *Longden*, 1 Wheat. 85. — Or, 3. where there is a change in regard to the parties, as in the case of a bond to a firm which afterwards admits a new partner. *Wright* v. *Russell*, 3 Wils. 530 ; *Barclay* v. *Lucas*, 1 T. R. 291, note ; *Metcalf* v. *Bruin*, 12 East, 399.

The case of *Dance* v. *Girdler*, 1 New Rep. 34, shows that subsequent formal elections do not constitute a new appointment ; though the case was decided on another point. See also *Hughes* v. *Smith*, 5 Johns. R. 168. Fixing the salary could not affect the bond. It made no alteration in the duties of the office, but merely substituted a permanent compensation for a *quantum meruit*. There is nothing in the case to show that it was not the intention of the surety to continue responsible.

W. Prescott, in replying, said that the commencement of the action could not be equivalent to an acceptance of the bond, for after a breach it was too late to accept it. The case of *Monumoi Beach* v. *Rogers*, relates to a ratification of an entry on land.

Suffolk, April 5th, 1826.

Parker C. J. delivered the opinion of the Court to the following effect. In regard to the first question, we should have supposed that in the case, as well of a corporation as of an individual, a paper intended for their benefit and found on their files, would be considered as having been accepted by them ; but it appears that in an action now pending before

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the Supreme Court of the United States, *Marshall* C. J. held, that the acceptance of a bond similar to the one in question should be proved by the record of a vote of the directors.[1] We think however that the case before us may be decided without touching that principle, for admitting it to be correct,

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we are nevertheless of opinion that the vote to accept the sureties, and the bond's being in the possession of the president, are a sufficient acceptance of the bond.

The other point made by the defendant is a pretty important one, namely, that the bond should be restricted by the term of the office, so that every election should be considered as the choice of a new officer, and a new bond should be taken. We do not doubt the soundness of the principle. It has been adopted in this commonwealth, and many of the authorities, which are numerous, are cited in *Boston Hat Manufactory* v. *Messinger*, 2 Pick. 223.[1] In some cases where the words would extend to an indefinite period, but where by the recital it appeared that the office was annual, it has been held that the obligation should be understood as referring to an office so limited. We should go even further, and say, that where it appears by the records of a corporation that the office, by their regulations, is an annual one, the bond should be restricted. And all this is founded on the intent of the parties. But the case before us does not seem to be one of that sort. The terms of the bond are general. There is nothing in it to show that a restriction was intended, and nothing in the records or regulations of the bank indicating that the office was annual.[2] We do not think that the reëlections of Chickering prove it to be such; he would have remained in office without a new election. There was

[1] The ruling of *Marshall* C. J. upon this point in the Circuit Court was adjudged erroneous, by the Supreme Court, and a new trial was granted on that account. *United States Bank* v. *Dandridge*, 12 Wheat. 64. (6 Peters's Condensed U. States Ct. R. 440.)

See also *Peppin* v. *Cooper*, 2 Barn. & Ald. 431; *Hassell* v. *Long*, 2 Maule & Selw. 363; *Leadley* v. *Evans*, 2 Bingh. 32; *S. C.* 9 Moore, 102, *Union Bank of Maryland* v. *Ridgely*, 1 Harr. & Gill, 432; *S. Carolina Society* v. *Johnson*, 1 M'Cord, 41; *Kennebec Bank* v. *Cooper*, 2 Greenl. 42; *Worcester Bank* v. *Reed*, 9 Mass. R. (Rand's ed.) 268, n. (*a*).

[2] See *Curling* v. *Chalkden*, 3 Maule & Selw. 502.

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nothing to make the sureties suppose it was limited to a year, but they must have signed, thinking they should be responsible for so long a period as Chickering should continue to be cashier.

Bond adjudged forfeited.[3]

BENJAMIN R. NICHOLS, Treasurer of the Norfolk and Bristol Turnpike Corporation, *versus* WILLIAM BERTRAM *et al.* 342

Passing in a vehicle swiftly by a turnpike gate and not stopping when called after to pay the toll, is a forcible passing within the meaning of the statutes respecting turnpike roads.

Erecting a toll-board with the rates of toll in the small Roman character, but of a large size, was held to be a compliance with a statute requiring them to be in "large or capital letters."

THIS was an action against the defendants for forcibly passing a turnpike gate of the Norfolk and Bristol Turnpike Corporation, without paying the toll.

Upon the trial, in the Court of Common Pleas, before *Williams* J., it appeared that the defendants were in a wagon drawn by one horse upon a quick trot, the toll-gatherer being at the door of the tollhouse, and the gate (which they knew to be a turnpike gate) being open; that the toll-gatherer called to them first when they had arrived within about one rod of the gate, again when they were passing him, and a third time after they had passed him; that they did not make any reply, nor pay the toll, but after they had gone about ten rods, greatly increased their speed.

It also appeared that the sign-board containing the rates of toll was written chiefly in the small Roman letter, but of a size so large as to be legible at the distance of more than three rods.

The defendants objected that the plaintiff had not proved a forcible passing, within the meaning of the statute creating the turnpike corporation, and that the rates of toll were not

[3] See *Dedham Bank* v. *Chickering*, 4 Pick. 314.

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in capital letters; and a verdict being taken in their favor by the direction of the judge, the plaintiff filed his exceptions.

The *St.* 1801, *c.* 69, establishing this corporation, provides that it shall, at each place where the toll shall be collected, erect a sign or board, with the rates of toll "fairly and legibly written thereon, in large or capital letters." The *St.* 1804, *c.* 125, which defines the general powers and duties of turnpike corporations, enacts in § 4, that all turnpike cor-

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porations shall erect a sign-board, with the rates of toll "fairly and legibly written or printed in capital letters; and whenever said corporation shall neglect so to do, they shall not be entitled to demand or receive any toll at the said gate."

Oct. 27th.

Metcalf and *Fiske*, for the plaintiff, said that the direction of the judge on the defendant's first objection was in the plaintiff's favor, and that he excepted only to the direction, that the words "large or capital" meant "large, to wit, capital." The intention of the legislature was that the letters should be easily legible, and this appears, not only from the phrase in the particular statute in question, but also from the variety of expressions used in different acts respecting toll bridges and turnpike roads; such as, "fairly and legibly written,"—"large letters,"—"large characters,"—"large capital letters,"—"large capital characters,"—"large and capital letters,"—"large or capital letters." Under the act creating this corporation, erecting a toll-board is not a condition precedent to their right to demand toll. The general act of 1804, *c.* 125, is prospective, even in terms, but if it were otherwise it could not affect the rights previously granted to this corporation.

Worthington, *contrà*, insisted, that "large or capital letters," in the private act, meant *capitals*, and that the expression "capital letters" in the general statute was explanatory. This last mentioned statute applies to all turnpike corporations without distinction, and it was so considered in *Wales* v. *Stetson*, 2 Mass. R. 143. Erecting a toll-board in capital letters was therefore a condition precedent to the right to demand toll. By a forcible passing, the statute means a

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violence done to the gate or to the person of the toll-gatherer.

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Per Curiam. We think that the defendants' passing swiftly by the gate and not stopping when called to, but increasing their speed, was a forcible passing. It was not necessary that there should be an assault and battery or a breach of the gate.[1]

On the other point it was argued, that the general statute superseded the private act; to which it was answered, that the corporation having a grant, it was not in the power of the 344
legislature to alter their rights, and that at least the general statute could not apply until it should be necessary to erect new toll-boards. And we think the grant is to govern. The question then is, whether "large or capital letters" means capitals or merely letters of a large size. A variety of expressions are used in the numerous statutes to which we have been referred. We think the general object of the legislature was to have the letters legible; and that they intended, that if the letters were large it should be sufficient, although they were not capitals, and that if they were capitals they should nevertheless be of a large size.[1] What are usually called small letters, if made large, should seem to be more easy to read than capital letters.

New trial granted.

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[1] See Revised Stat. c. 39, § 32.

[1] The Revised Statutes now require, that the rates of toll shall be "fairly and legibly written or printed in letters of a large size." Revised Stat. c. 39 § 27.

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NATHANIEL WENTWORTH *versus* The Inhabitants of the FIRST PARISH IN CANTON.

A parish has a right to take down a meetinghouse in order to rebuild, without conforming to the provisions of *St.* 1817, *c.* 189;[2] that statute not being intended to apply to parishes, but only to other proprietors of churches, &c.

THIS was an action on the case, in which the plaintiff, in his first count, alleged that he was seised and possessed of two pews in the First Congregational meetinghouse in Canton, and that the defendants, in pursuance of votes of the parish, pulled down the meetinghouse, thereby destroying the plaintiff's pews, without first causing them to be appraised pursuant to *St.* 1817, *c.* 189, § 5. [Revised Stat. *c.* 20, § 36.]

The second count contained the same allegations, and further, that after the erection of a new meetinghouse the proceeds of the sale of the new pews were not first applied to the payment to each proprietor of the pews taken down, at such appraised value, but were appropriated to another purpose.

The defendants pleaded, that the meetinghouse was their property, that it had become old and decayed, and that it was necessary to take it down and build another for their accom-
345 modation in attending upon the public worship of God; and that at a legal meeting they passed the votes mentioned, and in pursuance of those votes caused the old meetinghouse to be taken down and a new one to be erected.

To this plea the plaintiff demurred for cause.

Oct 27th. *Dunbar*, in support of the demurrer, argued that the *St.* 1817, *c.* 189, was applicable, as well to parishes, as to other proprietors of meetinghouses; *Gay* v. *Baker*, 17 Mass. R. 435; *Daniel* v. *Wood*, 1 Pick. 102; but that if not, the plaintiff was entitled to recover on the principles of the common law, (*Revere* v. *Gannett*, 1 Pick. 169,) and the part of the declaration which refers to the statute, might be rejected as surplusage. *Bennet* v. *Talbot*, 1 Salk. 212; *Stevens* v. *Bigelow*, 12 Mass. R. 438.

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[2] The provisions of this statute are now extended to parishes and societies Revised Stat. *c.* 20, § 37.

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Metcalf, *contrà*, contended that it was manifest from the phraseology of the statute, that it was not intended to apply to parishes. They had sufficient power before, so that the statute is unnecessary as to them; but it was otherwise with unincorporated proprietors, a majority of whom could not bind the minority. *Livingston* v. *Lynch*, 4 Johns. Ch. R. 573. The *dictum* in *Daniel* v. *Wood*, in regard to the statute, was extra-judicial. The right of the pewholder is subject to that of the parish; *Pettman* v. *Bridger*, 1 Phillim. 323, 324; *Pawson* v. *Scott*, Sayer, 176; and he can maintain no action against them for taking down an old and ruinous house in order to rebuild.

Suffolk, March 28th, 1826.

PARKER C. J. delivered the opinion of the Court. The validity of the special causes of demurrer depends upon the general question presented by the declaration and the plea in bar, which is, whether incorporated parishes, as such, are within the terms and meaning of the statute of 1817, *c.* 189, [Revised Stat. *c.* 20, § 36.] If they are, the plea in bar is wholly deficient in showing any defence; if they are not, the declaration is bad, because it alleges as the grounds of complaint, the non-compliance with the provisions of that statute, and that is the only cause of action averred.

We think, after a careful analysis of the statute, that it is very clear the legislature in enacting it had no reference to existing incorporated parishes, but only to the proprietors of meetinghouses, either incorporated or unincorporated, who might be supposed not to enjoy powers necessary for the objects contemplated in the statute. 346

The act is entitled "an act authorizing the proprietors of churches, &c., to regulate and manage their property and interest therein." The first section gives powers which all parishes possessed before, in regard to raising money for the purpose of altering, enlarging, repairing or rebuilding their houses of worship. The money is to be assessed on the pews, and the assessment is to be committed to the treasurer chosen by the proprietors to receive the same. A meeting of the proprietors is to be called by warrant from a justice of the peace on application to him by five proprietors, or by notification by the clerk, if any there be. These provisions, to-

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Wentworth v. First Parish in Canton.

gether with the whole tenor of the statute, satisfy us that it was not intended to enlarge or diminish the powers of parishes, but to give authority to other bodies which before the statute were supposed not to possess it.

This action therefore being brought entirely upon the statute, must fail, the remedy, if any injury has been sustained, being of a different nature

It has been before decided, in the case of *Daniel* v. *Wood et al.*, that the property of a pew in a meetinghouse is a qualified property, subject to the right of a majority of the parish to take down and destroy the house, wholly or only in part, if necessary for the purposes for which it was erected, that is, to repair, enlarge or rebuild the same, when it shall have become decayed or useless. It may be so far decayed as to be wholly unfit for use as a place of public worship, and then it may be entirely demolished; and the materials may be worked into a new house, or may be sold and the proceeds go into the treasury to aid in rebuilding; and in such case no individual pewholder can claim his share of the materials or the proceeds thereof, for he did not own them, but only the right of using the pew for the purpose of attending public worship. And this right is absolute while the house remains, for he may exclude every other person from it, and may maintain ejectment, case or trespass, according to circumstances, if he
347 should be disturbed in his right. It may be asked, what remedy is there for a minority of pewholders, if the majority shall determine to demolish the building, and thus destroy the pews. We answer none, if the act is necessary or proper. The property of all is dealt with in the same way, and the advantages are common to all. If, on the other hand, there should be a wanton or malicious abuse of power, by which the minority may be oppressed and their property destroyed, a case hardly to be imagined where those who do the act must suffer equally with the others, the laws will give a remedy to the extent of the injury received.

In the case above cited of *Daniel* v. *Wood et al.*, at the close of the opinion, it is suggested that the statute of 1817 might be considered as establishing the mode of executing the right existing in parishes, to take down and rebuild their meet-

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meetinghouses. The consideration of that question was not necessary in that suit, and the application of the statute to other proprietors only was not suggested; but even if the terms of that statute may be extended to parishes, so as to justify them in proceeding under it, and to give rights to pewholders in case the mode therein pointed out is adopted, it is plain that there is nothing in the statute obligatory on parishes, and that they may execute their legal powers in regard to parochial property, in the same manner that they could before the passing of the statute.

In the case of *Gay* v. *Baker*, 17 Mass. R. 435, this right in parishes is recognised. It is there intimated, that when by reason of altering or enlarging a meetinghouse the pew of an individual shall be destroyed, means should be provided for indemnity; and without doubt this ought to be done, in case an alteration takes place for convenience only; but if an entire demolition should become necessary in order to rebuild, the old house having so far decayed as to become unfit for the purpose for which it was erected, there should seem to be no injury and no damage.[1]

Plea adjudged good.

[1] It is now enacted by statute, that no person shall be entitled to compensation for a pew taken down, where the church or house of public worship shall have become unfit for public worship. Revised Stat. *c.* 20, § 38. See *Howard* v. *First Parish in North Bridgewater*, 7 Pick. 138; *Fisher* v. *Glover* 4 N. Hamp. R. 180; *Bates* v. *Sparrell*, 10 Mass. R. 323; *Revere* v. *Gennett* 1 Pick. 169.

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EDMUND BAKER *versus* ISAAC SANDERSON.

In case for obstructing the plaintiff's mills, the declaration alleged that the mills were leased, and that in consequence of the obstruction the tenants had threatened to quit, and the plaintiff had therefore been constrained to make a reduction in the rents. *Held*, that a sufficient cause of action was here set forth, and that a recovery would be a bar to any action by the tenants for the same obstruction.

The owner of a mill above a bridge, and of another below, conveyed this last, giving to the grantee a right "to make and maintain a dam to accommodate said mill, below the bridge," of a certain height. The grantee repaired and rebuilt, with some alteration, an old dam, which satisfied the terms of the deed, and afterwards built another dam below the bridge of the same height, the effect of which was to throw more water into his pond, and to injure the mill above the bridge. *Held*, that he had a right to maintain one dam only, and that the erection of the new dam was not authorized by the grant.

In an action by one of two grantors against the grantee, in which the construction of the deed came in question, it was *held*, that the other grantor was a competent witness, to establish a collateral fact as to the situation of the premises at the time of the grant.

THIS was an action upon the case, in which the plaintiff declared that the defendant, by erecting a dam on Neponset river below the plaintiff's mills, had obstructed the ancient course of the water and caused it to flow back upon the wheels of the plaintiff's mills, whereby they were retarded.

The declaration contained two counts. In the first, the plaintiff declared, that on the 25th of November, 1822, he was *seised and possessed*, and had been ever since seised and possessed of certain *ancient* mills, viz. a paper mill, grist mill, chocolate mill and woollen factory, situated near each other on Neponset river, above Milton bridge, and that he ought to have a free passage for the water to run off from the wheels, and that the defendant erected a dam across the river below the bridge, which obstructed the water, &c. In the second count he declared, that he was seised of a mill, called a paper mill, which was in lease to one Tileston and others as tenants at will, and that in consequence of the obstruction the power of the mill was so much diminished, that the tenants refused to pay the same amount of rent as they did before, and threatened to leave the mill; wherefore the plaintiff had been constrained to reduce his rent.

349 At the trial, before *Wilde* J., it appeared, that at a short distance above Milton bridge are situated two sets of mills,

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one on the northwest side of the river belonging to Baker, being the several mills mentioned in the declaration, the other on the southeast side belonging to D. T. Vose. These two sets of mills have one common dam and pond, and by an agreement made in 1795 between the respective owners at that time, the water was to be used on alternate days in cer tain seasons of the year; and that agreement still regulates the use of the water between the present owners. At that time D. Vose was owner of D. T. Vose's mills above the bridge and of the defendant's mill, hereafter mentioned, below the bridge; and the then owner of the plaintiff's mills granted to D. Vose, for the use of his mill below the bridge, the right to turn out all the water from the raceway of what are now the plaintiff's mills, to what is now the defendant's mill.

Below the bridge the defendant owns a mill on the southeast side of the river, and one Preston another on the northwest side, both depending for their supply of water upon what flows over or through the dam and flumes of the mills above the bridge.

In 1810 Baker and D. T. Vose were owners of the two sets of mills above the bridge, and on the 2d of July, 1810, Baker and wife and D. T. Vose, devisees of D. Vose, sold the defendant the mill below the bridge, by a deed containing the following clause; — "And the said Isaac Sanderson, his heirs and assigns for ever, has hereby a right granted him or them, to make and maintain a dam to accommodate said mill, below the bridge, on a level with the top of said hole drilled in said rock, and another drilled into the same rock, both having iron bolts drove into the same, and are on a level, one with another, but the said dam shall not at any time be built higher than the tops of said holes in said rock." Vose, one of the grantors, being called as a witness, though objected to by the defendant, stated that when they were about to make the deed to Sanderson, his pond was filled and the gates shut and the places marked where the water flowed on the rock; that the holes were then drilled and the bolts driven, and the deed made and delivered.

Sanderson had been in the occupation of his mill several years under a lease from D. Vose, and after his purchase he 350

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Baker v. Sanderson.

repaired and rebuilt the old stone dam, removing the lower part about six feet towards the centre of the stream, by which means he had a better pond, and in 1820 he again repaired and rebuilt the old dam, and he never had any other dam until in 1822 he built the dam complained of; previously to which he had built a new vat to his mill, and a new mill. This last dam was built by him for the accommodation of his mill, and not higher than the holes in the rock, but in a different place from the ancient dam, (which he still maintained,) and he contended that he had a right under the deed so to build it; but in order to ascertain the damage, if any, this point was, *pro formâ*, ruled against him. It was proved that this dam threw back and raised the water under the plaintiff's wheels from six to twelve inches higher than before. It extended from the south-easterly side of the river to Preston's dam, with which it was united.

The whole evidence of the plaintiff's damage applied to the diminution of power and profits during the time complained of, and it appeared that his mills had been occupied by different lessees, (except for a short time when some of them were occupied by himself,) who paid him rent, the grist mill being let upon shares, the chocolate mill for a sum proportioned to the quantity of chocolate manufactured, and the others at a fixed sum *per annum*; and that from these rents the plaintiff had made deductions, supposed to be equivalent to the tenants' loss of profits. The defendant objected, that as the mills were in the occupation and possession of tenants not parties to the suit, the damage proved, if any, affected only their possession or annual profits, and the plaintiff could not recover, or at least that he could recover only in proportion to his interest in these profits; but the jury were directed, that they should award to the plaintiff all the damage which during the time complained of they should find had been occasioned by the defendant's dam. The jury found a verdict for the plaintiff according to this direction.

If the Court should be of opinion, that the defendant's
351 deed authorized him to build the dam complained of, or that the plaintiff was not entitled to any part of the damages found by the jury, or that Vose's testimony, if it affects the con-

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struction of the deed unfavorably to the defendant, ought not to have been admitted, then the verdict was, by agreement, to be set aside and a verdict entered for the defendant. If the Court should think that the defendant had no right to build the dam, and that the plaintiff was entitled to a part, but not the whole of the damages found, a new trial was to be granted.

The defendant also moved in arrest of judgment, because the damages were general upon both counts, and the second count stated no cause of action for which the plaintiff could recover.

W. Sullivan and *Gorham*, for the defendant. The plaintiff should recover damages only for the time during which he was himself in the possession of his mills; for the reduction of the rent will not protect the defendant against an action by the tenants, it being *res inter alios acta*. The verdict is general on both counts. In the second count the plaintiff declares only that he was seised, and sets forth an injury to the annual profits only, for which he is not entitled to recover. 1 Chit. Pl. 142. [*Wilde* J. Here were covenants on which he was liable to his lessees.] Supposing that the leases contained the usual covenants, as for quiet possession, &c., there is no covenant against the unlawful acts of third persons. *Oct. 27th.*

But the principal question relates to the construction of the deed to the defendant. This deed authorizes him to build "a dam." The only restriction as to place is, that it shall be built below the bridge. The grantors had a right to make a dam anywhere below the bridge, and they have granted that right to the defendant, restraining him only in regard to the height of the dam. The parties may have been deceived in the operation of their contract, but they are nevertheless bound by it. The deed is not ambiguous, but if it were, it should be taken most strongly against the grantors.

Richardson and *Cushing*, *contrà*. The argument for the defendant proceeds on the ground that the new dam was built on the granted premises. We say that it was not. [*Wilde* J. The fact was not ascertained at the trial.] The words of the deed being general, that the grantee may make "a dam," creates an ambiguity; and the question is, what dam was meant. The grant is satisfied within the rights of the parties 352

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by the old dam; *Whitbread* v. *May*, 2 Bos. & Pul. 597 *Doe* v. *Oxenden*, 3 Taunt. 147; *Doe* v. *Greening*, 3 Maule & Selw. 171; and as the defendant had a right to make only one dam, by repairing and altering the old dam he is precluded, on the ground of election, from making another in a different place. He has given his own construction to the grant. 3 Atk. 577; *Cooke* v. *Booth*, Cowp. 819. The second count was formed from the precedent in *Leader* v. *Moxton*, 3 Wils. 461.

March 28th, 1826, in Suffolk.

Wilde J. delivered the opinion of the Court. The defendant moves for a new trial, and also in arrest of judgment.

In support of the motion in arrest, he relies on the objections made to the second count. In this count the plaintiff declares, that, at the time when his mills were obstructed in their operations, the same were, during a part of the time, in the possession of sundry tenants under the plaintiff. And the defendant's counsel contend, that for the damages arising during this portion of the time, he was, and still is, responsible to the tenants in possession, and not to the plaintiff, who had only a reversionary interest. This objection would have been insuperable, had it not been alleged, that the plaintiff, in consequence of the obstructions complained of, had reduced his rents, at the request of the tenants, they threatening to quit unless he would agree to a fair reduction;[1] that he did so agree, and that the tenants were satisfied with the reduction made. After such an agreement they could not maintain an action against the defendant, for damages occasioned by the obstructions complained of. That agreement and the plaintiff's recovery in this case, will be a good bar to any action that may be brought in the names of the tenants.[2] The complaint is

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of the injury suffered in the reversionary interest. No other damages were proved applicable to the second count, than those arising from the reduction of the rents, and no other damages could have been considered by the jury. It is very clear we think, that to damages thus assessed there can be no legal objection. We consider therefore the second count as good in substance and in form. All the material facts are

[1] See the remarks of *Putnam* J. in *Sumner* v. *Tileston*, 7 Pick. 206

[2] *Sumner* v. *Tileston*, 7 Pick. 198

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well alleged, and if the plaintiff could not recover in a special action of the case in this form, he would be without remedy.

As to the motion for a new trial, the first objection made to the verdict is, that the evidence does not support the first count. If this were true, it would not be a valid objection, provided both counts are substantially for the same cause of action. The rule is, that where there is but one cause of action, and there are several counts, and a general verdict is returned, the Court will not arrest judgment although one count be bad, but will allow the verdict to be altered so as to refer to the good count. So if the evidence supports one count, and not the others, no new trial will be granted, but judgment will be entered according to the verdict. For as there is but one cause of action, it is immaterial on which count the verdict is taken, or whether it be general or special.[1]

In the present case, however, the evidence applied partly to one count and partly to the other. It was proved, that for a short time the mills were occupied by the plaintiff, and as to the damages accruing during that time, he had a right to recover on the first count; and as to the residue of time, when the mills were in the occupation of the tenants, the evidence was only applicable to the second count, so that both counts are supported by the evidence, and are necessary.[2] The verdict is general, and this is right.

The second objection to the verdict is the most important, and involves a supposed misdirection to the jury, and a mis construction of the deed under which the defendant claims.

The clause to which this objection refers is in the words following, viz. "And the said Isaac Sanderson, his heirs and assigns for ever, has hereby a right granted him or them, to

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[1] See *Cornwall* v. *Gould*, 4 Pick. 446; *Kingsley* v. *Bill*, 9 Mass R. (Rand's ed.) 200, n. (*a*).

[2] But see *Sumner* v. *Tileston*, 7 Pick. 198, where it was alleged, that the plaintiff was seised and possessed of the mill, and the evidence was that it was occupied by a tenant at will at a rent reduced &c., and it was held, that the declaration was supported, for that the possession of the tenant was the possession of the plaintiff; *Putnam* J dissenting.

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make and maintain a dam to accommodate said mill, below the bridge, on a level with the top of said hole drilled in said rock, and another drilled into the same rock, both having iron bolts drove into the same, and are on a level one with another; but the said dam shall not, at any time, be built higher than the tops of said holes in said rock"

The question of construction is, whether, under this clause in the deed, the defendant had a right to erect the dam complained of. It appeared in evidence that the defendant, after his purchase, repaired and rebuilt an old dam, which was standing at the time of the grant, removing the lower part about six feet towards the centre of the stream, by which means he had a better pond; and that he then built a new vat to his mill, and built a new mill about two years before the erecting of the dam complained of; and that in 1820 he again repaired and rebuilt the old dam, and never had any other until he built the dam complained of, in 1822. The old dam thus rebuilt was on a level with the holes in the rock, and in all respects corresponded with and satisfied the terms of the clause referred to. It did not extend across the river, but from the bridge down to defendant's mills, so as to raise a pond on the southerly side of the stream. On the northerly side, contiguous thereto, was Preston's pond, and his dam was five or six inches lower than the defendant's The dam complained of was extended from the southeasterly side of the river to Preston's dam, and its operation was, to raise the water in Preston's pond, and to throw it back into the plaintiff's raceway, and thereby to supply the defendant's pond with water through the gap mentioned in the report. It did not regulate the height of the defendant's pond, and therefore it is obvious that it was not such a dam as was intended by the clause in the deed referred to. The defendant, by the deed, is entitled to but one dam; he has no right to erect one for the purpose of supplying his pond with water, and another for the purpose of regulating its height.

As to the testimony of Vose, we think it was admissible by the rules of evidence. It only went to establish a collateral fact as to the situation of the premises at the time of

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the grant.[1] But in the construction of the deed we do not rely on Vose's testimony, and it is therefore immaterial whether it is admissible or not.

Judgment according to the verdict.

[1] As to the admissibility of parol evidence in such a case, see 2 Stark. Evid. (5th Amer. edit.) 561, n. 1.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF ESSEX, NOVEMBER TERM 1825, AT SALEM.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, } JUSTICES.
HON. SAMUEL S. WILDE, }

THOMAS LUFKIN *versus* ABEL HASKELL.

No inhabitant of a town is a competent witness, either at common law or by *St.* 1792, *c* 32, to prove a custom for the inhabitants to dig clams in a particular spot.

By that statute an inhabitant is rendered competent, only in cases in which the town, in its corporate capacity, is a party or interested in the suit.

By a grant of a parcel of land which is covered by the sea at high water, nothing passes except what is comprehended within the terms of the deed; the colony law of 1641, declaring "that in all creeks, coves, &c., the proprietor or land adjoining shall have propriety to the low water mark," not exceeding 100 rods, being inapplicable to such a grant

TRESPASS for breaking the plaintiff's close and digging his clams there growing.

The defendant pleaded that the soil and freehold in the *locus in quo* were in the inhabitants of Gloucester. The plaintiff replied that the soil and freehold were in himself, and so it was found by the jury.

The defendant pleaded also, that for a time beyond the memory of man, the inhabitants of Gloucester have had and

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continued to have a right to go upon the *locus in quo*, where no grass or thatch grows, and there to dig clams for their own use, and that he, being an inhabitant &c., dug the clams &c. The plaintiff in his replication denied this right, but the jury found it to be in the defendant according to his plea.

At the trial, the plaintiff produced a deed of one Ingersol, dated in 1788, granting to him a parcel of thatch bank, which is situated at the mouth of Chebacco river, upon an isthmus, having that river on one side and the back river on the other, and at high tide is covered with water; and he contended that his grant of the thatch bank extended his title to the channel of the river on each side of the land, and so included the *locus in quo*, which is a gully of flats ground covered with water at half tide, where no thatch grass can grow. The defendant contended that such a construction was not applicable to this grant, and that the inhabitants of Gloucester, to whom the land once belonged, never intended, by a grant of the thatch bank, to grant the flats ground, which was the bed of their clams and necessary for their bait for the cod fishery. The jury however were instructed that the grant did extend to the channel on each side of the isthmus.

The evidence was very full, that all the inhabitants of Gloucester had for more than sixty years dug clams in the *locus in quo* for their own use, without any interruption from the owner of the thatch bank; but the plaintiff contended, that a right to do so cannot be claimed by prescription. The jury however were instructed otherwise.

The plaintiff objected to almost all the witnesses for the defendant, because they were inhabitants of Gloucester; but their testimony was admitted under *St.* 1792, *c.* 32.

The verdict was taken subject to the opinion of the whole Court.

Saltonstall and *Nash* for the plaintiff. 1. The inhabitants of Gloucester were not competent witnesses to prove the custom. The *St.* 1792, *c.* 32, which provides that where a town is *a party* or *interested* in the event of a suit, any inhabitant may be admitted as a competent witness, does not apply, for the town of Gloucester, as a corporation, is not a party or interested in this case, but the inhabitants are interested as individuals. 3 Dane's

Nov. 2nd.

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Lufkin v. Haskell.

Abr. 415 (*c.* 90, *art.* 4, § 3). — 2. The soil and freehold of the *locus in quo* was in the plaintiff according to the colony law of 1641. *Adams* v. *Frothingham*, 3 Mass. R. 360; *Storer* v. *Freeman*, 6 Mass. R. 435; *Doane* v. *Broadstreet Association*, ibid. 332. — 3. A custom to take a profit in another's soil is not good, but the party must prescribe in a *que* estate. *Gateward's case*, 6 Co. 60; *Grimstead* v. *Marlowe*, 4 T. R. 717; 1 Wms's Saund. 346, n. 2.

Andrews and *Cummins*, for the defendants, relied on the statute, in regard to the competency of the witnesses. If the inhabitants of Gloucester, who are the town, were interested, then they were competent within the words, as well as the spirit, of the statute. The right in dispute is a local privilege; the witnesses had no interest except as inhabitants of a certain territory. — 2. They admitted that a custom to take corn or grass would be bad; but a custom to take water, or to take fish, which is the present case, is good. Colony law of 1674, cited in 2 Dane's Abr. 693; *St.* 1795, *c.* 71, *preamb.* and § 3; *St.* 1798, *c.* 14; *St.* 1799, *c.* 19; *St.* 1808, *c.* 28. [See *Peck* v. *Lockwood*, 6 Hall's Law Journ. 278.] — 3. The grant of the thatch bank by the town of Gloucester, which was made in 1728, was to continue during the pleasure of the town, so that in fact the plaintiff has not a fee in the land granted; but supposing the fee to be in him, still the law of 1641 does not apply so as to transfer the flats ground, the land described in the grant being itself below high-water mark.

November sittings.

The opinion of the Court was read as drawn up by

Parker C. J. The first question is, whether the inhabitants of Gloucester were competent witnesses to prove a right in each and all of the inhabitants, to dig clams in the soil of the plaintiff, admitting it to be his soil.

By the common law they were not competent, each inhabitant being interested in the right contended for, and the verdict upon the custom in question being, as we suppose, evidence against the plaintiff in all future controversies with any inhabitant upon the same point. We do not know any other principle upon which they could be excluded, for other wise they are interested in the question only, not in the suit,

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and would be good witnesses. And it seems by *Jacobsen* v. *Fountain*, 2 Johns. R. 176, — *Hockley* v. *Lamb*, Ld. Raym. 731, — and *Reed* v. *Jackson*, 1 East, 355, that a verdict against one claiming a right of common as an inhabitant, &c., is good evidence against other inhabitants on the same point. In the case of *Reed* v. *Jackson*, Lord *Kenyon* says, "The record was admissible evidence, though between other parties, as to the finding upon the right to the public footway, which was negatived. The defendants in both cases stood in the same relative situation." In the case of customary commoners, a verdict in an action for or against one is evidence for or against another claiming in the same right.

Then the question is, whether by St. 1792, c. 32, the witnesses are made competent; and clearly they are not, for inhabitants &c. are made competent only where "the town, district, &c.. is a party or interested in the event of a suit." The town of Gloucester, as such, is not interested in the event of this suit; no corporate property or right is in question; it is a personal privilege, to individual inhabitants, and their interest is personal, and so not within the purview of that statute, which was intended to apply to inhabitants in cases where there was no personal interest.[1]

Whether the custom set up in defence, is good at common law, or not, it is unnecessary to decide; for we think upon another ground the case is with the defendants. We see no legal proof of title in the plaintiff. He claims under a right originally from the town, of a thatch bank. It is found

[1] See the provisions upon this head in Revised Stat. c. 94, § 54. See also *Odiorne* v. *Wade*, 8 Pick. 518. The courts of Connecticut, New Hampshire, New York and New Jersey seem to have adopted a general rule, that when corporations or quasi corporations, such as counties, towns, parishes, &c., are parties or interested in the suit, the members of such bodies are competent witnesses. *Cornwell* v. *Isham*, 1 Day, 35; *Fuller* v. *Hampton*, 5 Connect. R. 416; *Eustis* v. *Parker*, 1 N. Hamp. R 273; *Canning* v. *Pinkham*, 1 N. Hamp. R. 353; *Bloodgood* v. *Jamaica*, 12 Johns. R. 285; *Orange* v. *Springfield*, 1 Southard, 186. Such also is the law of Vermont, by statute of November 1816. So in an action by one State in the courts of another State, the inhabitants of the State suing are competent. *Connecticut* v. *Braish*, 14 Mass. R 296.

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that the *locus in quo*, is a gully covered by the sea when the tide is up, where no thatch can grow. We do not think this gully passed by the deed or vote, for nothing more would pass, than would satisfy the terms. The object was to enable the plaintiff to cut thatch. Nor is this a grant of upland which will carry with it flats to the channel. Thatch is not upland, but flats on which grass grows, and a grant of a piece of flats will not be extended beyond the intention expressed in the deed.

The case of *Adams* v. *Frothingham* is not like the one before us. There the grant was of shore, or land between high and low water mark, and for purposes which could not
360 be fulfilled without the privilege of the water to the channel. The case here is different, and like a grant of an acre out of a large marsh, for salt hay. No one would take this to be a grant of upland which would carry all the remaining marsh to the water, and so to the channel.[1] It appears by ancient records, statutes, &c., that the right of soil in all the flats was in the inhabitants of Gloucester, and we see no evidence of their having parted with it.

Judgment for the defendant.

[1] See *Codman* v. *Winslow*, 10 Mass. R. (Rand's ed.) 149, n. (a).

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MICHAEL ANNABLE *versus* SAMUEL PATCH *et al.*

Devise of "all the remainder of my estate, both real and personal, to my daughter S. A. and the children born of her body, including all my wife has the improvement of during her life after her decease." S. A. had three children when the will was made, and a fourth was born afterwards, all of whom survived the testator, and two more were born after his decease, which happened in 1781. *Held*, that S. A. and her four children living at the time of the testator's death, took an estate together in fee simple in the real property — in the part in which the widow had a life estate, a vested remainder which opened to let in the two afterborn children, and in the rest a qualified fee so limited as to admit their claims by way of executory devise; and that no right by survivorship having accrued before the passing of *St.* 1785, *c.* 62, § 4, respecting jointenancies, the devisees from that time held as tenants in common.

It seems also, that the afterborn children were entitled to share in the personal property by way of executory devise.

THIS was a *writ of entry*.

Upon a case stated it appeared, that on the 9th of July, 1777, Joseph Whipple, being seised in fee of the demanded premises, made his last will, which was afterwards approved and allowed on the 2d of July, 1781.

The testator, after saying, "And as to my worldly estate, &c., I dispose of it in the following manner," &c., gives to his wife certain personal estate, and the improvement during her natural life of certain real estate; and to his granddaughter Hannah Whipple twenty pounds; and then proceeds, "I give all the remainder of my estate, both real and personal, to my daughter Sarah Annable and the children born of her body, including all my wife has the improvement of during her life after her decease."

In virtue of this devise, Sarah Annable became seised of 361
the demanded premises and held possession until the 14th of October, 1822, when she died intestate, having had six children, namely, Joseph W., Michael, and Daniel, who were born before the making of the will, Solomon, who was born afterwards, all of whom were living at the decease of the testator, and Ephraim and Sarah, who were born after his decease. Michael died in the lifetime of his mother, under age and without issue. Joseph W., the eldest son, likewise died in the lifetime of his mother, leaving the demandant, who was his eldest son, and seven other children,

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all of whom were born after the decease of the testator, and were living at the decease of their grandmother Sarah Annable.

The tenants claimed under Daniel, Solomon, Ephraim, and Sarah, who upon the death of their mother entered into the demanded premises and conveyed the same to the tenants.

If upon these facts the demandant was entitled to the whole or any part of the demanded premises, judgment was to be entered accordingly ; otherwise he was to become non suit.

Nov. 2nd.

Saltonstall and *Cummins* for the demandant. 1. Sarah Annable took an estate tail. The words, "heirs of her body," are more technical than those used in this case ; but devises are construed liberally in order to effect the intention of the testator. 2 Bl. Com. 114 ; *Wyld's case*, 6 Co. 17 ; *Roe* v. *Lowe*, 1 H. Bl. 447 ; *Davie* v. *Stevens*, 1 Doug. 321 ; *Richardson* v. *Noyes*, 2 Mass. R. 70, note. The words, "children born of her body," mean the same thing as, "to be begotten," and comprehend as well those to be born, as those who are already born, and they are therefore words of limitation and not of purchase ; so that this case is distinguishable from *Wyld's case*. *Doe* v. *Hallett*, 1 Maule & Selw. 124 ; *Doe* v. *Perryn*, 3 T. R. 493 ; *Wood* v. *Baron*, 1 East, 259.

2. If an estate tail did not pass, then Sarah Annable and her three children living at the date of the will, took, according to *Wyld's* case, a jointenancy in fee, which by *St.* 1785, *c.* 62, § 4, was converted into a tenancy in common.

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J. Pickering, *contrà*. 1. It appears from the will, that the testator intended to dispose of all his estate. The words "children born of her body," are naturally words of purchase, and do not create an estate tail, unless such an intention is implied by other parts of the instrument ; which is not the case here. Anc. Chart. &c. 85 ; Fearne's Cont. Rem. (6th ed.) 153 ; *Shelley's case*, 1 Co. 93 ; *Wyld's case*, 6 Co. 17 ; *Buffar* v. *Bradford*, 2 Atk. 220 ; *Grover* v. *Pew*, 4 Dane's Abr. 617 ; *Richardson* v. *Noyes*, 2 Mass. R 56.

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2. Assuming then that Sarah Annable did not take an estate tail, the defendants contend that she took an estate in fee simple and in jointenancy with her four children who were living at the decease of the testator in 1781, when the estate vested. 2 Cruise's Dig. 498 ; *Oates* v. *Jackson*, 2 Str. 1172 ; *Doe* v. *Ironmonger*, 3 East, 533. The estate did not open to let in the afterborn children. The case of *Dingley* v. *Dingley*, 5 Mass. R. 535, related to real estate only, whereas this devise comprehends both real and personal ; it may be presumed that the testator knew that the estate in the personal property could not open, and that he intended the real property should go in the same manner as the personal, and that he meant to provide for those grandchildren only whom he knew. The statute of 1785 could not change the jointenancy into a tenancy in common, since the estate had vested before the statute was passed.

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Wilde J. delivered the opinion of the Court. It is difficult to ascertain with certainty the meaning of a will so unskilfully drawn as this is which is now depending. Whether it was the intention of the testator to give an estate tail to Sarah Annable, or an estate in fee simple to her and her children as tenants in common ; and if the latter, whether he intended to provide for all the children, or for those only who were living at the time of making the will, or who might be living at the time of his decease, does not distinctly appear by the language of the will, and must therefore be determined by rules of construction.

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The intention of the testator is to be regarded, if clearly expressed, although he may be ignorant of technical language, and may use it improperly ;[1] but if the intention is left doubtful, the will must be construed according to the legal import of the words of the devise.

These words are, " I give all the remainder of my estate, both real and personal, to my daughter Sarah Annable, and the children born of her body, including all my wife has the improvement of during her life after her decease."

The case must turn upon the construction to be put on

[1] See *Ingell* v. *Nooney*, 2 Pick. (2nd ed.) 366 and notes

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this clause of the will. The legal import of it is clear. The words "children born of her body," are words of purchase and not words of limitation. It was so decided in the case of *Buffar* v. *Bradford*, 2 Atk. 220. The words in that case were, "to my niece Buffar, and the children born of her body;" and the court held they were words of purchase, although the niece, at the time of making the will, had no child.[2] Unless therefore it appears from other parts of the will, that it was the intention of the testator to give an estate tail to his daughter, we cannot construe these words as words of limitation. This intention most clearly does not appear; and there is nothing therefore to control the legal import of the words.

But it has been argued, that if Sarah did not take an estate tail, she and her children took as joint tenants. But the St. 1785, c. 62, § 4, [see Revised Stat. c. 59, § 10,] is decisive on this point. It is no valid objection, that the will took effect before the passing of this act. The statute extends to past grants and devises in express terms, and its operation is not to impair any vested right. It serves rather to render the tenure more beneficial. No estate had vested in any survivor previous to the passing of the act, and therefore from and after that time, Sarah and her children held as tenants in common, whatever might have been the construction of the devise before.

As to the question, whether the children born after the will was made, can come in for their shares, we think that they may. "The children of her body" meant all the children she might have. This will not appear to be a strained construction of the words, when it is observed that as to part of the property the devise was prospective, it being of a remainder after a life estate to the widow. If the devisor had intended to limit his bounty to the children living when he made his will, he would have named them, or used words to show that he meant so to limit it.

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[2] *Parkman* v. *Bowdoin*, 1 Sumner, 366; *Jones* v. *Davies*, 4 Barn. & Adol. 43; *Ray* v. *Enslin*, 2 Mass. R. (Rand's ed.) 563, n. (a), and the cases there cited.

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We are therefore of opinion, that it was the intention of the testator that all the children should take under the will in equal shares with the mother. This intention may be carried into effect according to the rules of law. As to that part of the will in which a life estate was given to the widow, Sarah and the four children living at the decease of the testator took a vested remainder, which remainder may open to let in the afterborn children, according to the case of *Dingley* v. *Dingley*, 5 Mass. R. 535. As to the residue of the estate, it vested in Sarah and her four children, on the death of the testator. But it was a qualified fee, and so limited as to admit the claims of the afterborn children, and they may hold by way of executory devise. Fearne's Cont. Rem. (6th ed.) 399. There can be no legal objection to such a conditional limitation. It was formerly held in some cases, that an executory devise to a person not *in esse* was void, but it has been long settled that such a devise is good. *Stephens* v. *Stephens*, Cas. Temp. Talb. 228 ; Fearne, 495.

No question as to the personal estate is now before us, but there seems no doubt, that the afterborn children are entitled to their shares by way of executory devise, so that the intent of the testator, if we have rightly interpreted it, may in all respects be fulfilled.

Judgment for the demandant.

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DANIEL A. WHITE, Judge &c., *versus* ELIZABETH SWAIN, Administratrix.

More than twenty years after a distribution of an insolvent estate had been made and the account of the administratrix been settled, she received of the government of the United States, under the treaty with Spain of February 22, 1819, a sum of money, as an indemnity for the loss of property taken from the intestate by Spanish cruisers. Being cited by the judge of probate to account for this money, she refused, and the judge, upon the application of a creditor whose claim had been allowed by the commissioners of insolvency, authorized an action to be brought upon her administration bond. *Held*, that the action lay.

DEBT on an administration bond.

Upon a case stated it appeared, that the defendant was appointed administratrix of the goods and estate of her husband Edward Swain, and gave the bond in February 1799. She returned an inventory of the estate in May following. The estate was represented as insolvent, and a report of the debts due from it, amounting to 2903 dollars, was made by the commissioners in January 1800. The defendant at the same time settled her administration account, and the balance of 1425 dollars, which was all the property that had come into her hands as administratrix, was ordered to be distributed among the creditors of the estate; which was done accordingly. In September 1821, the defendant, in her capacity of administratrix, presented a claim to the commissioners under the late Spanish treaty, for the intestate's share of a certain vessel and part of a cargo, which formerly belonged to him and Thomas Ham, jointly. The claim was allowed and the defendant, pursuant to the award of the commissioners, received in September 1824, the sum of 3056 dollars. In the same September, upon the application of Ham, who was one of the creditors of the estate, and whose demand had been allowed by the commissioners of insolvency, she was cited by the judge of probate to account for this money. She appeared accordingly, but refusing to settle any account, the judge ordered her refusal to be recorded, and afterwards, upon the petition of Ham, authorized this action to be commenced

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barred by law, and that the defendant ought to account for the money last received, as assets belonging to the intestate's estate, then she was to be defaulted; but if the Court should be of opinion that the action could not now be maintained, then the plaintiff was to become nonsuit.

Saltonstall, for the plaintiff. An action upon the bond is a proper remedy in this case. *Boston* v. *Boylston*, 4 Mass. R. 325; *Cony* v. *Williams*, 9 Mass. R. 114; *Robbins* v. *Hayward*, 16 Mass. R. 524. The money was allowed by the commissioners under the treaty, on the ground of the defendant's claiming as administratrix, and was received by her in that capacity; so that there can be no question of its being assets. The *St.* 1817, *c.* 190, § 17, says that administration shall not be originally granted upon the estate of any person after the expiration of twenty years from his death; but it does not say that administration *de bonis non* may not; nor that the original administrator shall not be obliged to account after the expiration of such period. The allowance of Ham's claim by the commissioners of insolvency must be considered equivalent to a judgment, and the proceedings in the probate office repel any presumption of its having been paid. Nov. 4th

J. Pickering, *contrà*. The writ is not endorsed by any creditor, but by the judge of probate, and the Court will not allow him to institute a suit as a naked trustee, when no one is to derive a benefit from it. The administratrix settled her account twenty-five years ago, for all the property for which she was bound to account. With respect to this money, no decree has been passed requiring her to account, and she has therefore not broken her bond by refusing.

This money is not assets and the action is barred by lapse of time. Lands are not assets, except where there is a deficiency of personal estate; *Dean* v. *Dean*, 3 Mass. R. 261; rents and profits accrued after the testator's death are not assets; *Hays* v. *Jackson*, 6 Mass. R. 154; but goods &c. which are the intestate's "at his decease," are assets *Weeks* v. *Gibbs*, 9 Mass. R. 76. Real estate recovered by heirs, of which the intestate had been disseised twenty 367

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years, was held not to authorize a suit as for estate not inventoried, in a case of insolvency. *Johnson* v. *Libby*, 15 Mass. R. 140. *A fortiori* then should twenty years be a bar in regard to personal estate. The right to this property was not a chose in action which the administratrix was bound to inventory; it was a claim against a foreign government, and being denied by the regular judicial tribunals of that country, the Court will presume it was not due. Commissioners of the United States agree to consider this as a claim that might be made against Spain; but *non constat* that Spain would so consider it, or that that nation did wrong in taking the intestate's property. The claim therefore was not a right or credit which the administratrix had power to enforce, and was not included in the bond. The defendant made the claim as administratrix, because the rules established by our government required it; but it was in fact as agent for the heirs. This property then has accrued to the heirs since the decease of the intestate, just as much as the rents and profits of his real estate. The administratrix having made a distribution, we say she has fully administered. How long are the administratrix and her bondsmen to be liable on the bond, and how long is the estate to be kept open? Many of the creditors of the estate have died, some of them insolvent; shall all those estates be opened? The real estate of the intestate has been long since sold; now personal estate is found; shall the title to the real estate be called in question by the heirs, because the personal estate was not first applied to the debts? It is expedient that there should be some limitation to actions of this kind. The statute of 1817, *c.* 190, § 17, says that no original administration shall be granted after twenty years. This furnishes an argument that no demand should be made against an estate after that period. See also *Prov. St.* 9 *Geo.* 1, *c.* 1. Judgments are considered as barred in equity after twenty years, and there can be no difficulty in applying the same rule to the decisions of commissioners on insolvent estates.

368 *Saltonstall*, in reply. Lands and rents and profits are not assets, because by the statute they are not made such. There is no distinction between the claim against the Spanish gov-

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ernment and any bad debt. In respect to the want of power to enforce it, it is like a debt which is outlawed. The right accrued when the property was captured and not since; the treaty only furnished a mode of recovering the debt. There can be no limitation to an action on the bond, except by statute or from a presumption of payment. Here there is no such presumption, and we have no statute which is applicable.

November sittings.

Per Curiam. It being admitted that a large sum has been received by the defendant as administratrix, she is of course trustee of the heirs or creditors of the intestate, as the case may be. She was bound to account for this sum on the citation of the judge of probate, and by refusing, she committed a breach of the condition of the administration bond, which obliges her to administer all the estate of the deceased which has or shall come to her hands.[1] The money was the estate of the deceased, for it was received as damages for the violation and detention of his property; and the defendant having claimed it as administratrix, she is estopped to deny that it is the estate of the deceased.

Penalty of the bond adjudged forfeited.

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[1] It is now provided by the Revised Statutes, that if the whole assets shall not have been distributed upon the first order of distribution, or if further assets shall afterwards come to the hands of the executor or administrator, the judge of probate shall make such further decree or decrees for the distribution thereof, as the case may require. Revised Stat. *c.* 63, § 18. See *Dexter* v. *Arnold*, 3 Mason, 284; *Potter* v. *Titcomb*, 7 Greenl. 317.

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WILLIAM POTTER *versus* JOSEPH HALL.

Whether a stagecoach when actually travelling is liable to be stopped and attached on mesne process, *quære.*

But a stagecoach was attached about the time fixed for its departure, when part of the horses were fastened to it and the passengers were engaged and ready to take their seats, and the attachment was held valid.

So of an attachment of a stagecoach which had been driven into the yard of the tavern where it was accustomed to put up at the place of its destination, but had not distributed all its passengers.

THIS was *trespass* against the defendant, as sheriff of the county of Suffolk, for the act of his deputy, in attaching on mesne process two stagecoaches and four harnesses belonging to the plaintiff, while he was using them for the conveyance of passengers.

369 At the trial, before *Putnam* J., it was proved, that one of the coaches was attached near the appointed time for starting from Boston to Salem, when some of the horses were fastened to it and eight or nine passengers were engaged and were ready to go in the coach. The other had arrived at Boston from Salem, and was attached in the yard where it used to put up, and into which it was not commonly driven until after all the passengers had been distributed, but there were two female passengers still in the coach waiting to be carried to their respective places of destination in Boston, and the horses were still fastened to it, at the time when it was attached.

The defendant submitted to a default, but if the Court should be of opinion that the action could not be maintained, the plaintiff was to become nonsuit.

Vol. 4th. *Oliver*, for the plaintiff. The attachment was illegal, because property situated like these coaches is exempted from attachment. Our law of attachment is borrowed from the English law of distress, and whatever was exempted from distress at common law in England, is exempted from attachment here, except where our statutes have made an alteration or the reason of the exemption has ceased; neither of which is the case in the present instance. By the law of distress, whatever is in present use or occupation is exempt from distress; as the hat on a man's head or the horse on which he

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s riding; for to allow of a distress under such circumstances would lead to perpetual breaches of the peace. *Simpson* v. *Hartop*, Willes, 513; *Story* v. *Robinson*, 6 T. R. 139; *Gorton* v. *Falkner*, 4 T. R. 565; *Hutchins* v. *Chambers*, 1 Burr. 579; Co. Lit. 47 *a*, and Hargr. notes. So also whatever cannot be restored in the same plight, is exempted from distress; and in *Bond* v. *Ward*, 7 Mass. R. 128, this principle is admitted to be applicable to attachments. Vin Abr. Suppl. *Distress*, 536; 4 T. R. 568. Many things are exempted from distress, on the ground of public policy and because the convenience of trade seems to require it; as a horse standing in a smith's shop to be shod; cloth at a tailor's shop; a horse which has carried articles to market and is standing in the market. *Read* v. *Burley*, Cro. Eliz. 549, 596. 370

This attachment was illegal also on account of the manner in which the property was used after it was attached. By severing a distress the distress becomes illegal; for instance, it is lawful to distrain a horse and cart together, if found standing and not in actual use, but it is not lawful to take the horse from the cart or *vice versâ*. Vin. Abr. 173, 174, *Distress (R) pl.* 3, 8, 9.

All these principles are applicable to the present case. Both coaches were in actual use. Neither of them could be returned in the same plight; that is, with the horses harnessed to them, and as to one coach, with eight or nine passengers engaged and ready to take their seats, and as to the other, with two passengers waiting to be carried to their places of destination. It may be said that the passengers might be carried in other coaches, but why might it not, in the same manner, have been said in *Simpson* v. *Hartop*, where a loom was held to be illegally distrained, that the stocking then weaving upon it might be woven upon another loom? In making this attachment the officer severed both coaches from the horses, attaching only the coaches and harnesses. It is against public policy to suffer property of this kind, when in actual use, to be attached; not merely because such attachments have a tendency to occasion breaches of the peace, but also because the interests of third persons may be injuriously

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affected. Suppose a coach full of passengers, and carrying the mail, to be travelling at full speed, shall an officer, with a writ for perhaps a trifling demand, be allowed to attach it and to turn out all the passengers with their baggage? Or shall he be allowed to attach the horses alone, leaving the coach standing in the road? Or suppose the coach to have stopped at the tavern between Salem and Boston, and the passengers to have gone into the tavern to pay their fare, shall an attachment be made at that moment? Perhaps it will be said that one of these coaches had arrived at the place of its destination; but the answer is, that all the passengers had not been carried to their respective houses, and until then
371 the coach had not earned its fare. Persons who have engaged their passages and are ready to take their seats, may be exposed by an attachment to equal inconvenience with those who are already on the road, especially in places where another conveyance may not be so readily procured as in Boston. When real estate under lease is attached it must be subject to the lease; and personal property attached ought likewise to be subject to the contracts of the owner with third persons.

Saltonstall, contrà. An attachment under our laws was originally like a distress, but afterwards the property attached was made a security to satisfy a judgment which might be recovered, and very little analogy remained. In the progress of society many things have become liable to attachment here, which were not distrainable in ancient times; as beasts of the plough; books of a scholar; utensils of trade; and our statutes exempting certain articles from attachment, being in derogation of the common rights of creditors to secure their debts out of the property of their debtors, are to receive a strict construction. Com. Dig. *Distress, C*; 2 Inst. 132; *Buckingham* v. *Billings*, 13 Mass. R. 85; 5 Dane's Abr. 36; *Badlam* v. *Tucker*, 1 Pick. 389; *Daily* v. *May*, 5 Mass. R. 313; *Campbell* v. *Johnson*, 11 Mass. R. 184; *Penhallow* v. *Dwight*, 7 Mass. R. 34. Our writ of attachment is like a *fieri facias*, so far as it regards the kind of property to be taken. 2 Tidd's Pr. 917; *Pierce* v. *Jackson*, 6 Mass. R. 243; *Hutchins* v. *Chambers*, 1 Burr. 588

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The articles here attached were not of such a kind, nor so in use, as to come within the principle, that things in actual use shall not be distrained. As to the objection of severance, in a late case respecting an anchor, it was indeed held that while it was in actual use the cable could not be cut, as it might be detrimental to the ship; but no injury could happen here, as one of the coaches had not begun and the other had finished its course. The argument *ab inconvenienti* is the strongest one urged on the other side, but that would extend equally to steamboats and other vessels, and so, if held valid, would exempt from attachment a vast amount of property.

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Cummins, in reply, contended that steamboats, when in actual use in transporting passengers, would not be liable to attachment, and he remarked that so far as the great value of such property was an objection to its being exempted, a much larger amount of property was exempted by being in a process of manufacture.

November sittings.

The opinion of the Court was read as drawn up by

PARKER C. J. If the coaches were not liable to attachment, it must be because they were chattels *actually in use*, not because they could not be returned in the same plight, which was the ground on which *Bond* v. *Ward* was settled. If any thing is capable of being returned in the same plight, it is such a vehicle, for being kept under cover, it will be more valuable than if all the time in the use of the owner. As to their being actually in use, we should not be willing to decide that on that account alone they were not attachable, for the same reason will apply with equal force to ships, steamboats, and other marine vehicles employed in the transportation of goods or passengers, and I believe it has never yet been doubted, that under our laws such property is attachable. We think however that it is not necessary to decide the question thus broadly, viz. that a ship or vessel actually under weigh with freight or passengers, or a stagecoach actually on the road travelling, is attachable. There is difficulty in that question on both sides, but we feel clear that neither of the coaches was *so in use* when attached, as to be exempted. One was preparing to go out, with two of the

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horses hitched on, and the passengers engaged but not seated. We see not why, if the horses were in the barn harnessed and ready to be put to the coach, or the passengers had entered their names on the stage book the day before, the same reason for exemption would not exist. With respect to the other coach, it had arrived at its destined place, and although two female passengers were remaining in it expecting to be carried to their places of residence, yet this was not necessary, for they might have walked home, or the driver might without much inconvenience, if he was bound to see them at their houses, have provided other means of conveying them and their baggage.

373 It is said that property thus situated was not subject by the common law to distress for rent, and that the same law is to determine what property is or is not attachable under our statutes.

The principles of the common law will undoubtedly apply, because founded on reason, but the application of these principles may be different now, from that which was made several hundred years ago, when the rule was laid down. The state of the country then required larger exemptions than at present. Every thing then was subservient to agriculture. Now commerce and credit assume an equal rank, and things which were necessary for a man's living at a former period, have ceased to be so. And the parliament of Great Britain has regarded the change of circumstances in that kingdom, by providing in *St. 2 W. & M. c. 5*, that sheaves or shocks of corn, or corn in the straw, or loose, or hay upon a hovel, stack or rick, or otherwise, on the land, may be distrained for rent on a demise, lease or contract. And by *St. 11 Geo. 2, c. 19*, landlords are empowered to distrain all sorts of corn, grass, or other product growing on the estate demised, and to cut and gather them when ripe. These statutes, it is true, do not operate in this country, but the immemorial usage of the commonwealth under the various attachment laws, has a force equally binding; and several judicial decisions have occured, in which it has been considered, that as the reasons of the old common law have ceased, so also has the law ceased. Thus in the case of *Campbell* v. *John*

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son, 11 Mass R. 184, it was determined, that hay in a barn is liable to be attached on mesne process,[1] and *Sewall* C. J. expressly states as a ground of decision, that the condition of husbandry with us, and the circumstances of the country, did not require the application of the rule which the ancient common law was supposed to furnish. And in the case of *Penhallow* v. *Dwight*, it was decided, that corn standing in the field, if ripe, might be cut down and seized in execution.

The cases put in Com. Dig. to illustrate the general position, that chattels in actual use are not to be taken in distress, show that the rule was applied to things comparatively of 374
small value, and such as could not be taken without great inconvenience, and in some of the cases they were other persons' property accidentally upon the land; a horse actually in riding, or going to mill, or standing at the miller's door, &c. To apply a rule which had protected such kind of property, to articles of luxury, or of great value, would be contrary to the reason of the common law. Stagecoaches are often of great value, and many of them owned by the same person. Ships, steamboats, &c., come within the same reason; creditors, and credit itself, would be exceedingly injured, if they were held free from attachment.[1]

Our legislature seems to have considered the common law in this respect as obsolete, or repealed by usage, in the several statutes they have enacted, exempting articles of small value, but of great necessity, from attachment.[2]

Plaintiff nonsuit.

See *Merrill* v. *Bryant*, 8 Pick. 397.

[1] It is held in Tennessee, that the tools of a mechanic may be levied on to satisfy a judgment against him, while he is using them. *Bell* v. *Douglass*, 1 Yerger, 397. See *Howard* v. *Williams*, 2 Pick. (2nd ed.) 84, note 1.

[2] As to what articles are subject to attachment and execution, see Revised Stat. *c.* 90, § 24,—*c.* 97, § 19, 20, 21; as to what are exempted, see Revised Stat. *c.* 97, § 22.

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Lydia Very, Appellant from Decree of the Judge of Probate, *versus* Isaac Very, Executor.

Devise of "the remainder of my property, of whatsoever name or nature," accompanied with a schedule of the testator's property, which was all personal. *Held*, that the will did not purport a disposition of both real and personal estate, and therefore did not require the attestation of three witnesses.

In a will written by the testator himself and signed by him, but not attested, was the following clause: — "The remainder of my property, of whatsoever name or nature, I give and bequeath," &c. On the back he had written, — "P. S. I appoint my father J. V. executor of the within. The situation of my property is as follows, viz." &c., enumerating promissory notes and cash on hand. He was possessed of no real estate, and of no other personal estate than that mentioned in the "postscript," except his household furniture and goods. If the Court were of opinion that the will purports a disposition of both his real and personal estate, the decree of the judge of probate was to be reversed; otherwise, affirmed.

Nov. 4th. 375 *B. Merrill*, for the appellant, referred to *St.* 1783, *c.* 24, § 9, and 1 Pick. 241, note.

J. Pickering, for the appellee.

November sittings. *Per Curiam.* This will does not purport to dispose of real and personal estate, in the sense of the statute. The word *property* is equivocal, and *may* mean real as well as personal estate, but does not necessarily. We think the enumeration of property, all of which is personal, is to have an influence. It is the same thing as if the testator had said, "whatsoever property I have, viz. sundry notes, &c., I give, &c.[1]

Decree affirmed.

[1] The same formalities are now required to a will, whether it be for real or for personal estate. Revised Stat. *c.* 62, § 6.

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HANNAH CURRIER, Appellant, &c.

Where a man dies *testate* and *solvent*, and his widow waives her rights under the will, she is not entitled to an allowance by the judge of probate, of a portion of the personal estate of the deceased.

THE appellant presented a petition to the judge of probate, pursuant to *St.* 1805, *c.* 90, § 2, representing that the real estate of her husband was appraised at his decease at 22,984 dollars, and his personal estate at 5,197 dollars, and praying an allowance of such necessaries out of the personal estate of the deceased as should seem reasonable. The petitioner had waived the provision made for her in the will of her husband. The judge of probate decreed that she should have no allowance for necessaries, beside her apparel, out of the personal estate, her husband having died testate and his estate not appearing to be insolvent.[2] And upon an appeal to this Court the decree was affirmed. *November sittings.*

Cummins, for the appellant, referred to *Prov. St.* 9 *Anne*, *c.* 2, (Anc. Chart. 390); *St.* 1783, *c.* 24, § 8; *St.* 1805, *c.* 90, § 2; *St.* 1816, *c.* 95, § 1.

Moseley, *contrà*.

[2] Under the Revised Statutes it is required, that executors and administrators shall omit to inventory such provisions and other articles as shall be necessary for the sustenance of the widow, if any, and also of the family of the deceased, for forty days after his death, together with such further necessaries as the judge shall order to be allowed to the widow for the use of herself and the minor children, if any, under her care; and this, notwithstanding the widow may have received the provision made for her by the will. Revised Stat. *c.* 65, § 4, 6.

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SOPHIA W. BODWELL *versus* CALEB SWAN *et ux.*

In an action of slander, evidence tending to prove that the words spoken were true, or that there were reports in circulation of particular instances of impropriety in the plaintiff's conduct, will not be admitted under the general issue, in order to show that the defendant believed what he said to be true.

Under such issue the defendant may produce evidence of the plaintiff's general character.

Evidence of words spoken by the defendant after the commencement of the action, of a similar import with those charged in the declaration, is admissible to show malice.

THIS was an action of slander for words spoken by the wife, charging the plaintiff with fornication and adultery. Plea, the general issue.

At the trial, which was before *Lincoln* J., the plaintiff, to fortify the legal presumption of malice arising from the speaking of slanderous words, and as evidence of the malice with which the words laid in the declaration were uttered, offered evidence of the repetition by the wife, of similar slanderous expressions subsequently to the commencement of the action. This evidence was objected to by the defendants, because if such expressions were used, they would furnish ground for another action; but the judge overruled the objection, and admitted the evidence.

In their defence under the general issue the defendants proposed to prove, that the wife had been led by particular instances known to her of improper conduct on the part of the plaintiff in regard to men, both married and unmarried, and by reports, which were current in the town where the defendants lived, of the same and similar improprieties of conduct, to believe that the words spoken were true, in order to show that the speaking of the words was not malicious. But the judge ruled, that all the evidence proposed to be given of particular facts in the conduct of the plaintiff, or of reports respecting any particular instances of impropriety, was inadmissible.

The general character and rank in society of the plaintiff was inquired into without any objection being made.

A verdict was found for the plaintiff, subject to the opinion

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of the whole Court in regard to the correctness of the foregoing determinations.

Saltonstall, for the defendant, cited, to show that words spoken after the action was commenced were inadmissible in evidence, *Mead* v. *Daubigny*, Peake's Cas. 125; *Thomas* v. *Croswell*, 7 Johns. R. 270; — that the plaintiff's misconduct was admissible, *Larned* v. *Buffington*, 3 Mass. R. 553; *Alderman* v. *French*, 1 Pick. 7; — and that the reports in circulation were admissible, *Earl of Leicester* v. *Walter*, 2 Campb. 251; —— v. *Moor*, 1 Maule & Selw. 284; *Wyatt* v. *Gore*, 1 Holt's N. P. Cas. 299.

Cummins, *contrà*, cited to the first point, *Rustell* v. *Macquister*, 1 Campb. 48, note; *Wallis* v. *Mease*, 3 Binney, 546; 2 Phil. Ev. 107.

The opinion of the Court was read as drawn up by

PARKER C. J. It appears to us that the rejection of evidence offered by the defendants, tending to prove that the words spoken and charges made were true, in order to show that the wife believed what she said to be true, was right.[1] It was so settled in *Alderman* v. *French*, and upon sound principle. In truth, such evidence would answer all the purposes of the defendant, without exposing him to the just consequences of attempting to justify and failing in the attempt; and this further mischief would follow, that the notice to the plaintiff of what is intended to be proved, which is given by a special plea of justification, would be withholden, so that the plaintiff would be taken by surprise and have no opportunity to disprove the facts.

The modern refinements in the law of slander have been productive of more mischief than good. The defendants in such case ought to be ready to take the ground openly, that what they have said is true, or they should be ready to discharge themselves of malice under the general issue, in some

[1] See *Root* v. *King*, 7 Cowen, 631; *Bailey* v. *Hyde*, 3 Connect. R. 463; *Cook* v. *Barkley*, Pennington, 169; *Barns* v. *Webb*, 1 Tyler, 17; *Wormouth* v. *Cramer*, 3 Wendell, 395; *Shepard* v. *Merrill*, 13 Johns. R. 477; *Van Ankin* v. *Westfall*, 14 Johns. R. 233; *Henson* v. *Veach*, 1 Blackford, 370; Roscoe's Dig. Crim. Evid. (Amer. ed.) 539, n. 1; Starkie on Slander, (Amer. ed. 1832,) 295 n. (145.)

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of the ways which have been allowed as legitimate grounds of defence.

The same answer may be given to the offer of evidence, that there were stories and rumors in the neighbourhood, of a

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nature to raise a belief in the mind of the wife, that what she said was true.[1] These very stories may have originated in slander, and character could not be protected, if the third or fourth circulator should be able to defend himself or reduce the damages, because he only gave more publicity, and added the weight of his character, to calumny which had been originated by thers.

We take the rule to be, that the general bad character of the plaintiff may be shown,[2] because he relies upon its goodness before calumniated as the principal ground of damages. A fair character has been maliciously attacked, and the law will repair the mischief by damages; but to a reputation already soiled, the injury is small. The plaintiff is supposed also to be ready at all times to show the general goodness of his character; but it would be unreasonable to require of him to have witnesses ready to disprove particular facts, which he has no notice are intended to be proved against him.[3]

As to the admission of evidence on the part of the plain-

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[1] See *Alderman* v. *French*, 1 Pick. (2nd ed.) 18, n. 1; 2 Stark. Evid. (5th Amer. ed.) 469, n. 1; id. 217, n. (*k*); *Vessey* v. *Pike*, 3 Carr. & Payne, 512; *East* v. *Chapman*, 2 Carr. & Payne, 570; 3 *C.* Moody & Malk. 46.

In Kentucky the general currency of a report is not a justification of slander; but evidence of the general reputation is admissible in extenuation of malice and in mitigation of damages. *Calloway* v. *Middleton*, 2 Marshall, 372. In Indiana the defendant may prove in mitigation of damages, that there was a general suspicion of the plaintiff's guilt. *Henson* v. *Veach*, 1 Blackford, 371. So in Ohio. *Dewit* v. *Greenfield*, 5 Ohio R. 225. And he may also prove, under the general issue, in mitigation of damages or with a view of extenuating malice, any circumstance connected with the transaction, tending to show that he had probable ground for believing the truth of the words. *Wilson* v. *Apple*, 3 Ohio R. 270.

[2] See 2 Stark. Evid. (5th Amer. ed.) 470, n. (2); id. 216, n. (2); *Sawyer* v. *Eifort*, 2 Nott & M'Cord, 268; *Buford* v. *M'Lamy*, 1 Nott & M'Cord, 268; Starkie on Slander, (Amer. ed. 1832,) 298, 299, n. (147); *Dewit* v. *Greenfield*, 5 Ohio R. 225.

[3] *Andrews* v. *Vanduzer*, 11 Johns. R. 38; *Seymour* v. *Merrills*, 1 Root. 459; *Sawyer* v. *Eifort*, 2 Nott & M'Cord, 511; Starkie on Slander, (Amer. ed. 1832,) 299, n. (147)

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uff, of a repetition of the slanderous words even after the commencement of the suit, it is a difficult question. Lord *Kenyon* in *Charlter* v. *Barret*, Peake's Cas. 22, admitted such evidence. In the case of *Mead* v. *Daubigny*, *p.* 125 of same book, he refused it. Again in *Lee* v. *Huson*, ibid. 166. he admits other libels to be proved. Lord *Ellenborough*, in *Rustell* v. *Macquister*, 1 Campb. 48, note, admitted it, saying, the judge must tell the jury not to give damages for it *Spencer* J., in 7 Johns. R. 270, disapproved of the rule. *Tilghman* C. J., in 3 Binney, 546, adopts it with the qualification of instructing the jury; he regrets that the law is so. *Mansfield* C. J., in *Finnerty* v. *Tipper*, 2 Campb. 75, zealously opposes the general doctrine, and yet seems to admit that all the cases were decided right.

Phillipps, in his treatise on evidence, has undertaken to extract from these discrepancies a rule, which perhaps is the most reasonable one which can be adopted. In *vol.* 1, (2d ed.) *p.* 135, he says, "On a review of the cases, which have been above cited, it will be found, that in all of them except two, namely, *Lee* v. *Huson* and *Rustell* v. *Macquister*, the subsequent words or libels, offered in evidence, did expressly refer to those which were the subject of the action; 379
and in those two cases, it does not appear from the reports, whether they had, or had not, such a reference." According to *Mansfield* C. J., a repetition of the same words, or the same libel, may be proved, to show that the first was not heedless but malicious;[1] and we think that so far we may go;

[1] See *Kean* v. *M'Laughlin*, 2 Serg. & Rawle, 469; *Macleod* v. *Wakley* 3 Carr. & Payne, 311; *Shock* v. *M'Chesney*, 2 Yeates, 473; *M'Almont* v. *M'Clelland*, 14 Serg. & Rawle, 359; *Miller* v. *Kerr*, 2 M'Cord, 285; *Eccles* v. *Shackleford*, 1 Littell, 35; *Dupall* v. *Griffith*, 2 Harr. & Gill, 30; *Wilson* v. *Apple*, 3 Ohio R. 270; 2 Stark. Evid. (5th Amer. ed.) 465, n. (1).

Where the intention is not equivocal, the plaintiff cannot introduce subsequent declarations of the defendant to show with what motives the libel was published. *Stuart* v. *Lovell*, 2 Stark. R. 93.

Where words were given in evidence by the plaintiff, in order to prove a malicious intent by the defendant, which were not stated in the declaration, it was held, that the defendant might prove the truth of such words. *Warne* v. *Shadwell*, 2 Stark. R. 457; *Eccles* v. *Shackleford*, 1 Littell, 38.

In Tennessee it is held, that evidence of words spoken after suit brought, is not admissible. *Howell* v. *Cheatham*, Cooke 248

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but we cannot agree, that if a man sue another for calling him a thief, he may prove that at another time afterwards he also called him a murderer. This is a distinct calumny, for which the plaintiff has a right to his action, and though it may tend to prove malice as to the first words, so also will it necessarily go to enhance the damages; for no jury can say how much or how little of the damages were given on account of this second charge. The words proved in the case before us to have been spoken after the first and since the commencement of the suit, were of similar import with those charged in the declaration, and therefore may be considered as a repetition, and so admissible in evidence.

Judgment according to the verdict

Sophia W. Bodwell *versus* Benjamin Osgood.

A false complaint, made with express malice, or without probable cause, to a body having competent authority to redress the grievance complained of, may be the subject of an action for a libel; and the question of malice is to be determined by the jury.— So *held*, in the case of a letter from an inhabitant of a school district to the school committee, accusing the schoolmistress of a want of chastity.

The deliberate publication of a calumny, when the publisher knows it to be false, or has no reason to believe it to be true, is conclusive evidence of malice.

In an action for a libel, evidence of the defendant's procuring depositions, &c., to prove the truth of his charges, and afterwards declining to plead a justification, may be properly referred to the jury on the question of malice, but not on the question of damages.

In such an action brought by a schoolmistress against a man of wealth and influence, for accusing her of want of chastity, the verdict was for 1400 dollars; and the Court refused to grant a new trial on the ground of excessive damages

Case for a libel; plea, the general issue.

At the trial, before *Putnam* J., it appeared, that the plain-
380 tiff was a young lady of good education and of respectable connexions. She had been employed nine or ten years as a schoolmistress in Methuen, (where the parties belonged,) and in other towns, and was much respected in that employment. Her mother was dead. Her father, who was a physician, was unable to render any aid in supporting the family, and she had sisters younger than herself who depended very

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much upon her for advice and assistance. The defendant had been for many years a representative from his town in the General Court, twice a senator from this county, was a magistrate of very respectable character and the most wealthy inhabitant of Methuen.

The supposed libel was a written communication, dated May 3, 1824, addressed to the committee of a school district in Methuen, in which the defendant, after stating that he had been informed that the committee had employed the plaintiff to teach the school in that district the ensuing summer, remonstrates against the appointment, and accuses the plaintiff of want of chastity in several instances, and pledges himself to prove the charges.

The defendant's counsel did not contend that the charges were true, but they put the defence wholly on the absence of malice; asserting that the defendant believed the charges to be true when he made them, and that he not only had a right, but that it was a duty which he owed to his children and grandchildren, and to the preservation of the public morals, to submit them to the school committee for the purpose of procuring the removal of the plaintiff from the school; and that he had proceeded in this matter with great deliberation. The son of the defendant testified, that the defendant employed him to make inquiries, and to ascertain the truth of the reports which were in circulation respecting the plaintiff, and that he did so, and that he procured certificates in writing corresponding with the charges, which he delivered to the defendant before he wrote the supposed libel.

Much evidence was introduced, on both sides, as to the plaintiff's general character for chastity, and as to malice on the part of the defendant.

On this last point the plaintiff proved, that after the action 381
was commenced, and before the sitting of the Court of Common Pleas to which the writ was returnable, the defendant caused a number of witnesses (among whom was the plaintiff's father,) to be examined before a magistrate in Methuen, in a public manner, as well to prove the truth of the charges contained in the supposed libel, as to show that the plaintiff's general character for chastity was bad, when no legal cause ex-

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Bodwell v. Osgood.

isted, or was stated by the magistrate, for the taking of the depositions; the defendant suggesting merely, that he was apprehensive the witnesses would go out of the commonwealth before the sitting of the court, when there was no evidence that any of them had such an intention. The counsel for the plaintiff argued, that the defendant knew the charges to be false when he made them, for that it did not appear that he had at present any new light upon the subject, and yet he had not thought it expedient to plead the truth of the charges, and to give the plaintiff an opportunity of disproving them.

The counsel for the defendant contended, that even if he knew, when he made the complaint, that the charges were false, no action would lie, because the complaint was made to persons having competent authority to redress the grievance complained of. But the judge instructed the jury, that as the defendant did not contend that the charges were true, the verdict should be for the plaintiff, if she had proved that they were made and published maliciously; but that if the jury believed the defendant wrote and published the supposed libel under a belief that the charges were true, and with an honest intent to cause the plaintiff to be removed from the school for a want of chastity, the verdict should be for the defendant; that it was necessary to prove that the libel was malicious, as well as false, and that if the plaintiff did not prove the malice beyond any reasonable doubt, such doubt should operate in favor of the defendant; adopting the principle, that it was of the utmost importance that instructers of youth should be of pure morals. The judge remarked, that malice might be implied or expressed; and upon the subject of implied malice, he
382 referred to the evidence produced by the defendant, that he had employed his son to make inquiries, and to the fact, that the defendant was in possession of the certificates, and had formerly undertaken to prove the charges, but at the trial did not put the truth of them in issue. The jury were told, that they might consider what was the fair presumption arising from such conduct; whether it was, that the defendant had acted honestly, or maliciously, in making the charges; whether it was, that he then believed them to be true, or that he then knew them to be false.

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The jury found a verdict for the plaintiff for 1400 dollars damages. The defendant moved for a new trial, because the damages were excessive; because the jury were misdirected upon the subject of implied malice, as arising or to be presumed from the conduct of the defendant as above stated; and because no action will lie on the supposed libel, however false and malicious it may have been, for that it was in the nature of a petition to the General Court or any body of men authorized to grant redress.

Webster and *Saltonstall*, in support of the motion, contended, that the Court had the power, in an action of tort, to grant a new trial for excessive damages, and that this was a proper case for their interposition. *Duberly* v. *Gunning*, 4 T. R. 657; *Hewlett* v. *Cruchley*, 5 Taunt. 277; *Coffin* v. *Coffin*, 4 Mass. R. 1. Nov. 2d.

The instruction to the jury, that they might infer malice from the defendant's not pleading the truth in justification, was incorrect, or at least had a tendency to mislead; for if he had put in such a plea, and had failed to support it, that would have been considered evidence of malice. So that the defendant must be left without any mode of defence; since if he justifies, it is proof of malice; and if he does not justify, that too is proof of malice.[1] From his declining to justify, the jury might infer that the charges were not true, or that he could not prove them, but nothing more.

The school committee had authority to investigate the character of the plaintiff, and this action, therefore, cannot be maintained. *Cutler* v. *Dixon*, 4 Co. 14; *Lake* v. *King*, 1 Saund. 131; *Astley* v. *Younge*, 2 Burr. 807; *Rex* v. *Baillie*, 2 Esp. Dig. (3d ed.) 506; *Thorn* v. *Blanchard*, 5 Johns. R. 508. [*Remington* v. *Congdon*, 2 Pick. 310.] 383

The jury should have been instructed, that as the defendant had an interest in the subject of his complaint, and the paper was exhibited to those who had authority to make an investigation, the burden of proof was on the plaintiff to show express malice. The facts proved did not warrant the inference of a malicious intent. *Jarvis* v. *Hatheway*, 3 Johns. R.

[1] This apparent inconsistency in the law of slander has been removed by the Revised Stat. *c.* 100, § 19. See *post*, 385 note

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180; *M'Millan* v. *Birch*, 1 Binney, 178; *Weatherston* v. *Hawkins*, 1 T. R. 110; *Edmondson* v. *Stevenson*, Bull. N. P. (4th ed.) 8; *Hervey* v. *Dowson*, ibid.; *Rogers* v. *Clifton*, 3 Bos. & Pul. 587.

Cummins and *Spaulding*, *contrà*, on the point of excessive damages, referred to *Gilbert* v. *Burtenshaw*, Cowp. 230; *Leith* v. *Pope*, 2 W. Bl. 1327; *Duberley* v. *Gunning*, before cited; *Coleman* v. *Southwick*, 9 Johns. R. 45; *Merest* v. *Harvey*, 5 Taunt. 442. [See *Clark* v. *Binney*, 2 Pick. 118.] To show that even admitting the school committee had power to remove the plaintiff, (which they denied,) the action might be sustained upon proof of malice, and that malice might be inferred from the circumstances, they cited *Rogers* v. *Clifton*, 3 Bos. & Pul. 587; Hawk. P. C. *bk.* 1, *c.* 73, § 8; 2 Dane's Abr. *c.* 63, *art.* 4; 2 Phillipps on Evid. (6th ed.) 156.

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WILDE J. delivered the opinion of the Court. It can not be doubted that an action for a malicious prosecution might have been maintained upon the facts reported, if the accusation complained of had been made in the regular and ordinary course of justice, and before a tribunal having power to ascertain the truth or falsity of the charge, and to punish the supposed offender. But the school committee, to whom complaint was made, had no such power; and an action for a malicious prosecution would not lie. If, therefore, this action cannot be maintained, the plaintiff is remediless.

We do not, however, apprehend that the law is so defective as to afford no remedy in a case like this; nor in our opinion has any good reason been assigned, why the present action should not be sustained. As the case was left to the jury,

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we consider the fact established by the verdict, that the accusation was false and utterly groundless, and that the defendant knew it to be false at the time of publication. It may, therefore, be admitted, that if the defendant had proceeded with honest intentions, believing the accusation to be true, although in fact it was not, he would be entitled to protection; and that the occasion of the publication would prevent the legal inference of malice. Indeed the doctrine contended for by *Emmet*, in the case of *Thorn* v. *Blanchard*, 5 Johns. R. 508, and

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sanctioned by a majority of the Court of Errors, may be admitted, in its fullest extent, without impeaching the grounds of the present action. It was admitted, in that case, that the action might have been sustained, if there had been proof of express malice, or want of probable cause. In this case there was such proof, and it was put to the jury to decide whether the publication was malicious or not. And they were instructed to find for the defendant, if they should be of opinion, from the evidence, that he acted with honest intentions, and believed that the charges made in the supposed libel were true. The jury, therefore, must have been brought to the conclusion, that he did not act with such intentions, and that he did not believe the charges to be true; that he acted maliciously, and not with a view to correct a public grievance, for that he knew no such grievance as the one alleged in the libel existed. We think the evidence sufficient to warrant these conclusions; and if so, then most certainly there was sufficient evidence of malice, and the defendant's principal ground of defence utterly fails.

The deliberate publication of a calumny, when the publisher knows it to be false, or has no reason to believe it to be true, is conclusive evidence of malice. It is, however, unnecessary to weigh the evidence; it is sufficient that it was satisfactory to the jury, and proper for their consideration. And it is clear, that in the class of cases in which this ranges itself, the question of malice is exclusively for the jury. It was, therefore, properly left to the jury to say whether, considering all the circumstances of the case, the conduct of the defendant was not malicious.[1]

So also the instructions to the jury seem to us perfectly correct. It would have been wrong, no doubt, as has been urged by the counsel for the defendant, to consider the not pleading in justification as a cause for enhancing damages. But the direction is not to be so understood. The jury were to 385

1 See *Remington* v. *Congdon*, 2 Pick. (2nd ed.) 315, n. 1; 2 Stark. Evid (5th Amer. ed.) 467, note; Starkie on Slander, (Amer. ed. 1832,) 140, 141; *Robinson* v. *May*, 2 Smith, 3; *Blake* v. *Pilford*, 1 Moody & Rob. 198; *Knight* v. *Gibbs*, 3 Neville & Mann. 467; *S. C.* 1 Adolph. & Ellis, 43; *Toogood* v. *Spyring*, 1 Crompt., Mees. & Roscoe, 181; *S. C.* 4 Tyrwh. 582.

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Bodwell v. Osgood.

decide whether the publication was malicious or not, and the evidence of the defendant's procuring depositions, &c., before trial, and after all, declining any attempt to prove the truth of the charges, was referred to the jury on the question of malice; and this was clearly correct.[1]

It has been argued that the jury should have been instructed, that the application to a tribunal competent to redress the supposed grievance, was *primâ facie* evidence that the defendant acted fairly, and that the burden of proof was on the plaintiff to remove this presumption. The judge was not requested thus to instruct the jury. He did, however, instruct them that the burden of proof was on the plaintiff to satisfy them that the libel was malicious, and that if the plaintiff did not prove the malice beyond any reasonable doubt, that doubt should be in favor of the defendant. It was unnecessary to be more particular, and it seems impossible that on this point the jury could have been misled.

As to the damages, they are certainly large, perhaps too large, but not so extravagant as to justify the interference of the Court. We do not doubt our power to grant new trials on the ground of excessive damages, in cases of personal torts; and when they are clearly excessive, and greatly disproportionate to the injury proved, we are bound to interpose.[2] But a strong case must be made out; and this does not appear to us to be such a case, considering the aggravated nature of the

[1] See *Thomas* v. *Croswell*, 7 Johns. R. 264; *King* v. *Root*, 4 Wendell, 113. An unsuccessful attempt to justify the truth of the words spoken, in a civil action, is evidence of malice. *Root* v. *King*, 7 Cowen, 613; *Hix* v *Drury*, 5 Pick. 296; *Jackson* v. *Stetson*, 15 Mass. R. 48. So it is said, in *Dewit* v. *Greenfield*, 5 Ohio R. 225.

It is now, however, provided by the Revised Statutes in Massachusetts, that a plea of justification by reason of the truth of the words spoken or published, though not supported by the evidence, shall not in any case be of itself proof of the malice alleged in the declaration. Revised Stat. *c.* 100, § 19.

[2] *Clark* v. *Binney*, 2 Pick. (2nd ed.) 121, n. (1); Starkie on Slander, (Amer ed. 1832,) 301, n. (149); *Davis* v. *Davis*, 2 Nott & M'Cord, 81; *Riley* v. *Nugent*, 1 Marshall, (Ken.) 431; *Orpwood* v. *Barkes*, 12 Moore, 492; *S. C.* 4 Bingh. 261.

A new trial was granted where $5000 had been given in an action for slander, the damages appearing under the circumstances to be excessive *Nettles* v. *Harrison*, 2 M'Cord, 230.

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charge, and the situation of the parties. The plaintiff being an unprotected female, having nothing whereon to depend but an unblemished reputation, and the defendant being a man of wealth and influence, we cannot say that the damages are clearly exorbitant.

Motion for new trial overruled.

WELLS SMITH, Petitioner for *Certiorari.* 386

A private, in a company of militia, who is excused for a term of time, upon a surgeon's certificate, from performing military duty, on account of bodily infirmity, is not thereby excused from attending at meetings for the choice of officers of the company.

THE petitioner, a private in a company of militia, obtained from the surgeon of his regiment a certificate, (pursuant to *St.* 1809, *c.* 108, § 29,) dated May 3, 1825, that "he ought to be excused from military duty for one year, on account of his being deprived in a great degree of the use of the forefinger of his right hand," and on the back of the certificate the captain of the company wrote that he was exempted for one year from that date; which was approved by the colonel of the regiment. The petitioner was afterwards duly warned to appear at a meeting of the company on the 17th of August, 1825, for the choice of company officers, but neglected to attend, and upon a complaint to a justice of the peace, was fined for such neglect. Whereupon he filed this petition for a *certiorari* to the justice.

L. Thorndike, in support of the petition, contended, that a person excused on a surgeon's certificate was by the statute exempted from all military duty and virtually disenrolled; *Commonwealth* v. *Fitz*, 11 Mass. R. 542; *Commonwealth* v. *Smith*, ibid. 459, 460; for otherwise it would have been provided expressly, as it is by § 1 in the case of persons conditionally exempted, that he should attend meetings for the choice of company officers; that the captain of the company had no right to narrow the exemption; and that consequently § 34, *art.* 33, which imposes the penalty, though general in

Nov 5th.

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Smith, Petitioner &c.

May term 1826.

its terms, was not intended to apply to persons exempted, like the petitioner, under § 29.

PUTNAM J. delivered the opinion of the Court. The petitioner is obliged to perform all the services in his power, which are required of soldiers in the militia, from the performance of which he has not been excused. From the great importance which has always been attached to this subject by the legislative and executive branches of the government, we are warranted in the opinion, that the exemptions should be strictly construed; to the end that the public may receive the benefit of all the services which the soldier can render.

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The petitioner claims to be exempted on account of an injury which has happened to one of his limbs; which would render it difficult, if not impossible, for him to perform all the military manœuvres which are executed by the soldiers, but would not prevent him from walking or writing.

The meeting which the petitioner neglected to attend, was not for the purpose of training, but merely for the choice of officers; and he was as able to do that duty, as any one whose name was borne upon the company roll. But it is argued, that the surgeon's certificate operates as a disenrolment. There is no necessity for giving that enlarged construction to the statute, or for believing that the legislature intended to excuse the party from doing what he was capable of executing, merely because they excused him from doing what the surgeon certified he was incapable of performing. He might well meet and vote, notwithstanding he might not well march or handle a musket. Our opinion is, that the legislature intended to exempt the party from the performance of such services only as he was disqualified by reason of such bodily infirmity to perform, but not from such as he could execute just as well as if his limbs were in perfect health and proportion.

And it is to be observed, that the meeting for the election of officers is one of great importance; for the discipline and efficiency of the soldiers depend essentially upon the qualifications of their commanders. These are to hold their offices until discharged by order of law, and the public have a right to the exercise of the judgment of all the soldiers qualified to vote in that important concern. To extend the excuse to

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cover the neglect of the petitioner, would be to enforce the letter against the intent of the statute.[1]

Smith, Petitioner &c.

We are all of opinion, therefore, that the petitioner shall take nothing by his petition.

[1] See Revised Stat. c. 12, § 2

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF SUFFOLK AND NANTUCKET, MARCH TERM 1826, AT BOSTON

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, }
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON, }

JONATHAN MERRY *versus* MARTIN GAY.*

In an action of *covenant* a plea of *non est factum* may be joined with a plea of payment.

Nov. term 1825.

ACTION of *covenant broken*, on a charter-party. Under leave to plead double, the defendant filed a plea of *non est factum*, and also of payment.

Leland, for the plaintiff, moved the Court to set aside these pleas for repugnancy. In support of the motion, he relied upon the observations of *Jackson* J. in *Alderman* v. *French*, 1 Pick. 13, 14, and the cases there cited.

Metcalf, *contrà*, said it seemed not to have been considered, that all the cases, in which it had been held that these pleas *could not* be joined, were in the Court of Common Pleas, where by the former practice the defendant was required, on

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* The Reporter is indebted to Mr. Metcalf for the report of this case.

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moving for leave to plead double, to state what pleas he intended to file, and the court refused leave, whenever they regarded the proposed pleas as inconsistent or unnecessary; and that much less liberality prevailed in that court than in the King's Bench, where leave to plead double is allowed of course, as in this Court, and without inquiry concerning the matters to be pleaded. 1 Archbold's Pract. 123; 1 Tidd's Pract. (1st Am. ed.) 609 *et seq.* In 1 Sellon's Pract. 299, is a case in which *Buller* J. overruled a motion to set aside the pleas of *non est factum*, *solvit ad diem* and *solvit post diem*, stating the different practice of the two courts. And even in the Common Pleas, the former strictness is relaxed. *Wilson* v. *Ames*, 5 Taunt. 340. In *Cutts* v. *United States*, 1 Gallis. 69, the general issue and payment were pleaded without objection. Remarks of *Duncan* J. in *Rogers et al.* v. *Old*, 5 Serg. & Rawle, 411. The only pleas that are now disallowed, on the ground of inconsistency, are those of the general issue and a tender. Stephen on Pleading, 293.

PARKER C. J., after advising with the other judges, said the Court were less concerned to ascertain the preponderance of authority in the English books, than to adopt the most reasonable and beneficial rule for their own guidance; that the practice of this Court, in regard to granting leave to plead double, more resembled that of the King's Bench, than that of the Common Pleas at the time of the decisions cited by the plaintiff's counsel; that in all courts less strictness on this subject now prevailed than formerly; and that as it might not unfrequently be important to a defendant to have the benefit of both these pleas, especially in actions of debt and covenant, the Court were unanimously of opinion, that the pleas were well pleaded together.[1]

Plaintiff took nothing by his motion.

[1] It appears to be generally understood as a sound rule, at the present day, that mere inconsistency between two or more pleas in bar is no objection to their being pleaded together. Gould's Pleading, 434; Chitty's Pl. (6th Am ed.) 592 to 595. See *Union Bank* v. *Ridgley*, 1 Harr. & Gill, 324; *Wilson* v *Ames*, 5 Taun 340; *Pleading several matters*, 3 Bingh. 635.

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WILLIAM R. STACY, Petitioner &c., *versus* GARDNER P. LYON.

The *St.* 1809, *c.* 108, § 1, exempting schoolmasters from militia duty, extends to masters of private schools. [See Revised Stat. *c.* 12, § 5.]

UPON a complaint brought before the Justices' Court for the county of Suffolk by the petitioner, as clerk of a company of militia, against the respondent, for neglecting to attend several musters of that company in 1824, it was admitted by the parties, that the respondent was a schoolmaster in Boston, and regularly employed as such, when the supposed neglects took place; that he instructed children in the common branches of education, namely, reading, writing, arithmetic, grammar, geography, history, natural philosophy, &c.; that he occupied a schoolhouse, in which he was regularly employed from eight o'clock A. M. to one o'clock P. M. and from half-past two or three to five or six P. M. every day in the week, except Sunday; that he instructed from twenty-five to thirty-five boys, and as many girls; and that he was not employed by the municipal government of Boston, but kept a private school on his own account. The respondent was acquitted, and thereupon the complainant presented his petition to this Court for a writ of *certiorari* to the Justices' Court.

The case was argued before *Parker* C. J., who laid it before the whole Court.

July 1825. *Z. G. Whitman*, in support of the petition, cited *St.* 1785, *c.* 42, § 3, 4; *Commonwealth* v. *Dedham*, 16 Mass. R. 141.

W. Phillips and *Sewall*, *contrà*, referred to Com. Dig. *Uses*, *N* 3; *Prov. St.* 11 *Ann. c.* 1, § 7, (Anc. Chart. &c. 398); *Prov. Stat.* 5 *W. & M. c.* 7, § 12, (Anc. Chart. &c. 262); *St.* 1820, *c.* 16; *St.* 1789, *c.* 19; *Farnam's case*, 2 Leon. 186.

March 20*th*. PUTNAM J. delivered the opinion of the Court. The question in this case is, whether the respondent is exempted from performing duty as a soldier in the militia. The objection on the part of the petitioner is, that the respondent was not
391 employed by the municipal government of the city of Boston, but that he only kept a private school on his own account.

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The *St.* 1809, *c.* 108, § 1, exempts, among other persons, "officers and students of any college actually resident there, preceptors of academies and schoolmasters while actually employed as such." And it is argued, that the exemption is to be confined to masters of public schools and to officers of public or corporate institutions.

The words of the statute are general; those who are schoolmasters are exempted; and reference is had merely to the criterion of actual employment.

But if the words should be taken without any limitation, they would include masters who are employed to teach fencing and dancing, as well as those who are instructers in letters and morals. The *St.* 43 *Eliz. c.* 4, authorizes the appointment of commissioners to inquire of any breaches of trust in regard to grants for charitable purposes, and among such are mentioned "schools of learning"; and it has been decided that the statute does not extend to dancing or fencing schools. Com. Dig. *Uses*, *N* 3. But schools for writing, languages, music, mathematics, &c., are said to be schools of learning. Com. Dig. *ubi supra*. Among the proper subjects of instruction, the *St.* 1809, *c.* 108, § 1, intended to include those which were taught by the respondent, and all such other subjects as may be properly said to relate to morals and good literature. The people have manifested the greatest solicitude for the general dissemination of knowledge, from the first settlement of this country until the present day; requiring that all who should be instructers should have the proper literary, as well as moral qualifications, including as well those who should teach children in their early ages in the first principles of reading, as those who should be employed in the instruction of children and youth of more advanced years in the higher branches of knowledge. *Vid. St.* 1789, *c.* 19.

No discrimination is made in the statute now under consideration, between those who should be employed by private individuals, or by corporations; nor do we find any such distinction in any of the former statutes relating to the militia. 392
By the colony law, (Anc. Chart. &c. 160,) "professed" schoolmasters are exempted; and the same words are used

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Stacy v. Lyon.

in *Prov. St.* 5 *W. & M. c.* 7. In the year 1776, during the revolutionary war, all the people were required to serve in person or by substitute, excepting only quakers, settled ministers of the gospel, the president, professors, tutors, librarian and undergraduates of Harvard College. Anc. Chart. &c. 802. But that was at a time when we were contending with all our power for liberty and national existence.

By the first militia law which was made after the peace (*St.* 1793, *c.* 14, § 3) "stated schoolmasters" were exempted. And so the law continued until *St.* 1799, *c.* 73, when by a new draft of the militia law, schoolmasters were not included among the exempts. It is to be observed, however, that the legislature did not by that act make any distinction between the teachers of public and of private schools. They were all called upon to quit their civil employments and serve in the militia. Whatever the regulation was, it applied to all of them, whether it exempted them by the general terms of *stated* or *professed* schoolmasters, or whether it deprived them of any exemption at all.

Ten years passed away before they were recognised (by *St.* 1809, *c.* 108) as the ancient and favored class of citizens, whose services were so continued, laborious, useful and necessary for the State, as to require a restoration of their former exemption.

Now it seems to us, that whether this subject be considered in regard to the masters, or to the scholars, or to the militia itself, there are many reasons to suppose that the legislature intended a general exemption.

In regard to the masters, their education and habits qualify them to command rather than to obey. It would be generally found that very good schoolmasters would make very poor soldiers. Their sedentary habits and literary occupation would almost disqualify them for the hardy and athletic duties of soldiers.

And in regard to the scholars, if they were to see their
393 master attempting to execute the various military manœuvres required of soldiers, it would tend to lessen that veneration and respect for him, which should be indelibly impressed

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on their minds. All those manœuvres are proper and graceful for a soldier or cadet, but not so becoming to the character of a grave instructer of youth. Such an exhibition would also have a tendency to impair his power of governing his scholars; and just so far as these effects would be in fact produced, the measure should be deprecated. And besides, the legislature might well suppose that it would be more useful for the scholars to be kept under the instruction and restraint of their masters, than to be ranging about without control among the spectators of the parade. Much evil both to body and mind may happen in the latter course, much good would certainly follow from the former.

And these reasons apply as well to private as to public schools. The respondent has a number of scholars, probably equal to the average number of those in the public schools. In some towns, the number of scholars in the private school is probably twice as great as in the town school. If it be true that the great object is to have the children and youth instructed, what reason is there for letting loose the scholars of the private schools, which might not as well be applied to those of the town schools?

And as to the militia itself, it might well be supposed by the legislature, that no very effective aid would be realized, if the schoolmasters were thrown into the ranks. It would be found, with but very few exceptions, that they would do the duty in an unsoldierlike and awkward manner, and their best efforts would be feeble, compared with those of the hardy men who are accustomed to bear arms. Generally the schoolmasters would not attempt to do the duty; many of them, because they could not do it; but most of them would refuse from a regard to the gravity of their employment, and to prevent the pain of exhibiting themselves in a situation which might excite the ridicule of their scholars. The operation would be in most cases to compel schoolmasters to pay their fines. But that result we think could not have been intended by the legislature. The services which they render are exceedingly important and fatiguing, and they are not generally so well compensated as to make it reasonable to require fines, in lieu of services from them as soldiers. 394

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Whether this case be considered in reference to the words of the statute, or according to the reason and expediency of the provision, our opinion is, that the respondent is not liable to duty in the militia. The petitioner is therefore to take nothing by his petition.

The President &c. of the State Bank *versus* Titus Welles, Executor.

A clerk of a bank stole from the drawer of another clerk, bills belonging to the bank, which he delivered over to the cashier, and which the cashier, not knowing they had been thus stolen, accepted in discharge of the balance due from such clerk to the bank. *Held*, that this was no payment.

Debt on a bond made by E. V. Baxter as principal, and Abraham Touro, the defendant's testator, as surety, for the faithful performance by Baxter of his duties as second teller of the State bank. Plea, performance from the 10th of January, 1817, the date of the bond, to the 19th of November, 1818, when Baxter was discharged from that trust. Replication, that on the 10th of January, and at other times, Baxter received as second teller 10,000 dollars, which he did not account for and pay over to the first teller according to the condition of the bond. Rejoinder, that on the 19th of November, 1818, the plaintiffs and Baxter accounted together, and that there were then due from him as teller 27,211 dollars 30 cents, which he paid to the plaintiffs. Surrejoinder, denying the fact of payment; and issue thereon.

The following facts were stated by the parties. On the trial the defendant called George Homer, the cashier of the State bank, who testified, that on the 18th of November, 1818, Baxter was discharged from his office; that it appeared
395 by the books, that there was then a balance due from him to the bank of 27,211 dollars 30 cents, which he then delivered over to the witness; that the particular parcels in which that sum was delivered, were designated in the books of the bank kept by Baxter, and that among those parcels was one containing 5633 dollars of the bills of the Boston bank.

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The plaintiffs thereupon offered to prove, and it was agreed that their evidence, if admitted, would prove, that 4770 dollars of the parcel of 5633 were not received by Baxter in the usual course of business, but were feloniously taken by him from the drawer of the first teller, in his absence, without his privity or consent, and were the plaintiffs' property; and that the cashier, at the time when the 27,211 dollars 30 cents were delivered over to him, did not know that the 4770 dollars had been taken by Baxter in the manner above mentioned.

It was agreed, that if on this statement the Court should be of opinion that the evidence offered by the plaintiffs was admissible, judgment should be rendered in their favor for such sum as the Court, on a hearing in equity, should order; but that if the evidence was not admissible, the plaintiffs should become nonsuit.

On the argument, however, no question was made whether the evidence was admissible, but whether it furnished a sufficient answer to the defence.

Davis (Solicitor General) and *J. T. Austin*, contended, *March 10th* that the delivery over to the plaintiffs of their own money, which had been stolen from them by the teller, was not a payment. The teller was not an ordinary debtor of the bank, but was bound to account for and pay over specifically the bills, gold, &c., which he had received in his official capacity.

Fletcher and *Bliss*, for the defendant. The surety became responsible only for the official acts of Baxter, and is not liable for theft committed by him, which is an unofficial act. *Foster* v. *Essex Bank*, 17 Mass. R. 479. He appropriated to his official account money which he had stolen, and the bank accepted it in payment. It is too late for them to retract and call upon the surety. *Marryatts* v. *White*, 2 Starkie, 101. If the cashier accepted the money and gave the teller a dis- 396
charge, not knowing that part of the money was stolen, the surety ought not be responsible for his ignorance. The surety had no opportunity of knowing the fact, but the cashier had, and he was bound to see that the money was properly paid. The only question is, which of two innocent persons shall suffer; and we think the loss ought to fall upon the plaintiffs,

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State Bank v. Welles. *March 20th.*

they alone having had the means of detecting the teller's misconduct.

Per Curiam. We are clear that the teller's taking the money feloniously from another teller's drawer and delivering it over to the cashier, does not amount to payment.

Defendant defaulted

URIAH FOLGER, Petitioner for Partition, *versus* CHRISTOPHER MITCHELL *et al.*

Under *St.* 1783, *c.* 39, § 8, the proprietors of common and undivided land may make a valid partition by vote, and without any instrument under seal.

Pursuant to votes, such proprietors laid out several large tracts of land, each into 27 equal parcels, and having arranged themselves into 27 classes as nearly equal in interest as might be, assigned by lot to each class one parcel of each tract, to be held in common by the members of the class and to the exclusion of the other proprietors. *Held*, that such partition was valid.

If in a partition the parcels of land are made certain by the metes and bounds referred to, an error in the courses and distances stated will be immaterial.

A partition under *St.* 1783, *c.* 39, will be valid, notwithstanding that in some instances the shares are assigned to the heirs, sons, &c., of A, B, &c., without naming the assignees except by words of description.

If such proprietors appoint a committee to survey a tract of land, and to lay it out in lots preparatory to a partition, they may either assent to the doings of the committee, or make partition without regard to them; so that if only a part of the members of the committee should act, and the proprietors should ratify their doings, and make partition accordingly, the proceedings would be valid.

If a petition for partition is discontinued, it will not defeat a voluntary partition made by the proprietors themselves while it was pending.

FOLGER, in his petition, alleges that he is interested with Mitchell and others in all the common and undivided land on the island of Nantucket, as the same was held in common and undivided on the 9th of December, 1813, and prays that partition may now be made among the proprietors, and that his share may be set off and assigned to him to hold in sev-
397 eralty. Libni Gardner, one of the proprietors, appears, and pleads that he and certain other proprietors own in severalty 8384 acres and 48 rods, part of the lands mentioned in the petition as being in common and undivided, and that these 8384 acres and 48 rods have been allotted, assigned and set

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off to them to hold in severalty, by the proprietors of the common and undivided land on the island, since the 9th of December, 1813, and that they are also seised of certain shares in the residue of the common and undivided lands, and traverses the seisin of the petitioner; on which traverse an issue to the country is joined.

At the trial the petitioner produced evidence in support of his title, which it is unnecessary to state.

It appeared that the interest in the land on the island, (except what has been legally divided) is considered as subsisting in 27 rights or shares, belonging to as many classes of proprietors, each of which shares represents an aliquot proportion of all the undivided lands, equal to 636 sheep's commons, the whole number of sheep's commons being 17,172. The names of all the members of a class are written together in the proprietors' records, and the number of sheep's commons claimed by each member is set against his name. Since the 9th of December, 1813, the proprietors have made partition of eleven large tracts of land, containing about 8384 acres and 48 rods, which the respondent claims that he and others own in severalty. In making partition of each of these eleven tracts the proprietors have first voted to make partition of a particular tract, and appointed a committee to carry the vote into effect. This committee, having surveyed the tract and divided it into 27 parts, have exhibited to the proprietors a report of their doings, and a plan of the land divided into 27 allotments, each allot ment being numbered and described on the plan. The committee have also placed bounds or monuments at each of the 27 parcels, so as to enable the class that might draw it to find it with ease. The proprietors at a public meeting have accepted the report and plan, and having classed themselves into 27 great classes in such manner as to produce as much equality in interest as was attainable, they have drawn lots by classes for the 27 parcels in the tract. The parcel drawn by a class 398
was to belong to the members of the class, as tenants in common with each other, but in severalty as to all other persons. The parcels drawn, and the classes which have respectively drawn them, have then been recorded in the books of the proprietary. The courses and distances of the exterior bounds of

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Folger v. Mitchell.

the eleven large tracts are given on the plans, and in the reports of the committees, and the exterior boundaries are for the most part natural boundaries, which are well known among the people at Nantucket; so that all of them could be found with ease if no courses and distances were stated, or if any of those stated should be incorrect. Portions of the parcels so drawn by lot have been frequently transferred by descent, devise, sale, &c. In the eleven divisions the petitioner had his full proportion set off to him. It did not appear that the petitioner was present at the meetings at which these transactions took place, but due notice was given of the meetings and of the objects of them, and it did not appear that any person objected to any of the proceedings.

The petitioner now objected, among other things, that whereas the committee appointed to lay out a tract, called *Gibbs' swamp*, consisted of three persons, the report of the committee was signed and made by only two of them. But it was proved that the tract was laid out and the plan made by all three; that after this, one of them died before signing the report, and it was therefore presented and accepted without his signature, but that he had assented to every part of the plan and report before his death. The petitioner objected that this evidence was inadmissible.

The petitioner likewise objected, that one or more of the eleven partitions was made in 1821, while a petition of Thomas Folger for partition was pending in the Court of Common Pleas at Nantucket; but it appeared that that suit had been discontinued.

If the Court should be of opinion, that the petitioner ought to recover, they were to adjudge him such part, either of the whole land described in the petition, or of any parcel thereof, as they should find him entitled to; but if they should be of a contrary opinion, judgment was to be entered for the respondent.

399 *March 11th*

Shaw and *Savage*, for the petitioner, cited, to show that a partition should be by deed, *Johnson* v. *Wilson*, Willes, 248; *St.* 1783, *c.* 39, § 5; 4 Dane's Abr. 120; *Porter* v. *Perkins*, 5 Mass. R. 235; — and to each proprietor in severalty, since otherwise all the inconveniences of a tenancy in com-

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mon would remain, Lit. § 243, and Coke's Commentary; *Porter* v. *Hill*, 9 Mass. R. 34; *Bartlet* v. *Harlow*, 12 Mass. R. 348; *Baldwin* v. *Whiting*, 13 Mass. R. 57: — and that a partition made by the proprietors pending a petition by one of them for partition, is invalid, *Stearns* v. *Stearns*, 16 Mass. R. 167.

Prescott and *Adan*, for the respondent, cited Anc. Charters &c. 247, 402; *St.* 1783, *c.* 39, § 8; *Codman* v. *Winslow*, 10 Mass. R. 146.

March 20th.

WILDE J. delivered the opinion of the Court. The facts appearing in evidence on the trial of the issue are reported, and several questions of law have been raised which are to be now decided. The first in order would be that which relates to the petitioner's title, but the objections made at the trial are now waived; so that the only general question remaining to be considered is, whether the several divisions or partitions, which have been made by the proprietors of the common and undivided lands since the 9th day of December 1813, and under which the respondents claim, are valid in law.

These divisions were made in pursuance of the votes of the proprietors at a regular meeting, and a committee was appointed to make the allotments; which, being made, were drawn for by lots, and in classes, and thus were assigned, each class to hold in common among themselves the part assigned to them, and to the exclusion of the other proprietors.

Several objections have been made to these divisions. The first is, that it was a partition by parol, and not by deed, and therefore void. In the case of *Adams* v. *Frothingham*, 3 Mass. R. 352, it was decided, that proprietors of common lands might legally divide their lands, or make allotments thereof, by vote, and without deed. The same principle was recognised in the case of *Codman & al.* v. *Winslow*, 10 Mass. R. 146, 400
and again in the case of *The Inhabitants of Springfield* v. *Miller*, 12 Mass. R. 415, and the same has been repeatedly so decided at nisi prius; and it is admitted by the petitioner's counsel, that in respect to ancient divisions and allotments the law is clearly so. We think that more recent divisions and

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Folger v. Mitchell.

allotments are supported by reasons equally cogent. After a construction has been given to a statute, titles acquired in pursuance of such construction ought not to be disturbed. The colony law, and the *St.* 1783, *c.* 39, are substantially the same, and should receive the same construction. This construction, being settled as to the colony law, must be applied also to the revised statute. Indeed the revised statute did nothing more on this point, than to reënact the same provision. The law, therefore, was not changed, and every one interested might well act on the presumption, that the construction was settled by the cases referred to. But were it otherwise, and were this statute now to be construed for the first time, we have no doubt that the construction contended for by the respondents' counsel is the correct one. The language of the statute is general, and does not prescribe the manner in which division is to be made, but expressly authorizes the proprietors to make division in such way and manner as shall be agreed upon by the major part of the interested present at any legal meeting.[1] This way and manner must be agreed upon by the proprietors, and the proceedings must be recorded. The addition of a seal to the vote of the corporation would give no additional security or certainty to the conveyance. It is not required by the statute. The statute of frauds is clearly not applicable.

The next objection to be considered is, that the proprietors were not authorized to create any new tenancies in common, but should have assigned to each his purparty. On a writ *de partitione faciendâ* at common law, or under the statutes of 31 and 32 *Hen.* 8, this was necessary. This writ, at common law, only lay between parceners, and there was no difficulty in assigning to each her purparty. When the law was extended by the statutes cited, to jointenants and tenants in common

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they were authorized to make partition in the same manner as parceners had a right to make it at common law. Our statute which provides for partition has no such reference, nor does it require expressly that the share set off shall be held in severalty. No case has been cited in which such a construction

[1] See Revised Stat. *c.* 43, § 6, 7.

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has been given. In the case of *Mitchell & al.* v. *Starluck & al.* 10 Mass. R. 5, no such objection was made, and a different construction was adopted. But we do not think it necessary to decide this point in the present case, which turns on another statute, as to the construction of which we have no doubt. The proprietors had a right to divide in the manner most convenient to them. If they were compelled to assign to each proprietor his purparty, it would be impossible for them to make partition unless all the proprietors were known; and in many cases it would be difficult, if not impossible, to obtain such knowledge. Such a construction, therefore, would be extremely inconvenient, if it would not wholly defeat the object of the statute. The language of the statute does not require this construction, but the obvious meaning is, that proprietors may divide their lands in such way and manner, as they may deem most conducive to their mutual interests.

But it has been argued that these divisions were not reasonable; that they were oppressive and injurious to the interests of the small proprietors, and prevented them from having their shares set off to them respectively in one allotment. It is very possible, perhaps probable, that the mode adopted by the proprietors may operate as some inconvenience to some of the small proprietors; but no fraudulent intention appears, and a strong case must be made out to authorize the Court to set aside the divisions on the ground of inconvenience. To set them aside would probably occasion much greater inconvenience and injury than can be reasonably apprehended from establishing them.

Another objection made is, that the survey was loose and inaccurate, and that the courses and distances given will not bring the lines together conformably to the plan. This objection may be made in almost every case of a survey of a large tract of land, where the same is divided into small lots. 402
It is hardly possible to obtain perfect accuracy, but the rights of the parties may be commonly ascertained. According to a familiar rule of construction, courses and distances are made to conform to the metes and bounds referred to; and it appears by the report, that the exterior lines and boundaries of the several tracts of land divided are well known, so that all of them

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can be found with ease, and could be so, if no courses and distances were given, or were given incorrectly.[1]

Another objection is, that the shares in some instances are assigned to heirs, sons, &c., without naming the assignees, except by words of description. But this exception is clearly insufficient to impeach the validity of the divisions. Those who answer to the description will take, for the description is certain and clear.

Another objection is, that the report of the committee appointed to lay out the tract called "Gibbs' Swamp," is void, having been signed by only two of the committee, the whole number being three. This, however, we think is well enough, the third person having joined in all the acts except signing the report, and this we do not think at all important. The return would be good if made by one of the committee at the request of the others. If a plan only had been returned to the proprietors, it would have been sufficient; and the division would have been good even without any return. The proprietors could undoubtedly make the division in a manner different from that reported. The committee were appointed to procure information and to do certain acts, and though all should have joined to bind the proprietors, yet if only one had acted, it would have been competent for the proprietors to ratify his doings and proceed in the partition.[2]

Only one objection more remains to be considered. It is urged, that when the division was made in 1821, a petition for partition was pending in the Court of Common Pleas, and that the pendency of that suit superseded the doings of the proprietors. No doubt that would have been true, had the petitioner proceeded to final judgment; but the mere pendency of
403 that suit cannot be pleaded in the present. It is understood that neither of the petitions now pending was instituted before the divisions set up by the respondents were completed.

Upon the whole, therefore, as to the 8384 acres and 48

[1] See *Howe* v. *Bass*, 2 Mass. R. (Rand's ed.) 380, 384, n. (a), and cases there collected.

[2] See *First Parish in Sutton* v. *Cole*, *ante*, 245; *Emerson* v. *Newbury*, 13 Pick. 379; *Shaw* v. *Nudd*, 8 Pick. 9.

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rods, the petitioner has no title, and as to the residue, no objection is made to the prayer of the petition. If the residue can be described with sufficient certainty, commissioners will be appointed to make partition accordingly.

JOSHUA LORING *et al. versus* NEWELL BRACKETT.

One of two joint plaintiffs, who had formerly been partners, having agreed that the action should be discontinued, the other made affidavit that the cause of action was a debt due to the partnership, and that the agreement was made to defraud him by collusion between his co-plaintiff and the defendant, and thereupon the Court refused to order a nonsuit.

ASSUMPSIT. On a motion by *Leland*, that the Court would order a nonsuit, upon an agreement of the plaintiffs that the action should be discontinued — *March 11th*

S. D. Parker, in behalf of Loring, objected that the plaintiffs were formerly partners; that the action was brought to recover a debt due to the partnership; that Price, the other plaintiff, had made the agreement by collusion with the defendant; and that the question of fraud must be determined by the jury. In support of these facts he produced Loring's affidavit. He cited Gow on Partn. 75; 1 Montag. on Partn. 108.

Leland remarked that the affidavit stated only that the defendant was indebted to the partnership; that it did not appear that Loring himself was not likewise indebted to it; and that when a partnership is dissolved, any debtor may settle with either of the partners and obtain a discharge.

Parker, in reply, said that Loring could make affidavit that Price was indebted to the partnership; and he compared this case to those in which a release after an assignment has been set aside.

Per Curiam. We think we ought not to order a nonsuit; but the defendant will have an opportunity, when the cause shall be tried, of showing what effect should be given to the agreement in question.[1]

[1] *Eastman* v. *Wright*, 6 Pick. 323.

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SAMUEL HASKELL *versus* JOHN A. HAVEN *et al.*

A notification to a creditor that his debtor intends to take the benefit of *St.* 1787, *c.* 29, [see Revised Stat. *c.* 98,] for the relief of poor debtors, cannot be avoided by showing that it was signed in blank by the justice of the peace, and, while he was out of the commonwealth, was filled out and served.

The certificate of the two justices of the peace who administer the poor debtor's oath, that the return of such notification is conformable to law, cannot be contradicted by extrinsic evidence.[1]

The acts of such justices where they have no jurisdiction, may be avoided by plea or evidence.

DEBT on a prison bond. Plea, that the debtor imprisoned was discharged by order of law. Replication, that no notice was given to the plaintiff of the time and place of examining and administering the poor debtors' oath to such debtor; and issue on that fact.

The defendants produced a copy of the proceedings in common form, certified by two justices of the peace, *quorum unus*, setting forth that it appeared to the justices, that the keeper of the prison, upon the complaint of the debtor that he had not estate sufficient to support him in prison, had applied to Joseph H. Pierce, a justice of the peace, and that Pierce had thereupon made out a notification under his hand and seal, signifying to the plaintiff the prisoner's desire of taking the benefit of the statute of 1787, *c.* 29; and that it further appeared, that the notification and the return thereof had been duly made; also setting forth the administering of the poor debtors' oath, and the prisoner's discharge.

It was proved, that on the day of the date of the notification, and for a long time before and after, Pierce was absent from the commonwealth, being at the city of Washington. The evidence to this point was objected to, on the ground that the certificate was conclusive; but the objection was overruled. Pierce testified that he was absent, as before stated, and had left blank notifications signed by him for the convenience of the gaoler and the prisoners.

A verdict was taken for the defendants, which was to be set aside and the defendants to be defaulted, if the proceedings mentioned do not constitute a legal discharge of the bond.

[1] For the form of this certificate, see Revised Stat. *c.* 98, § 10.

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Haskell v. Haven. March 15th.

Prescott and *Mason* contended, that the plaintiff might go into evidence to show that the order of the two justices was void, since, their jurisdiction being limited, without appeal, and not according to the course of the common law, there was no opportunity to reverse their proceedings. The justices had no jurisdiction, for the debtor did not pursue strictly the requirements of *St.* 1787, *c.* 29. The keeper of the prison ought actually to make an application, and to a justice of the peace *within* and for the county in which the prison is situated. The justice is to appoint a time and place for administering the oath. This appointment is a judicial act, which cannot be delegated. If it is left to be done by the prisoner or gaoler, an improper time and place may be appointed, to the prejudice of the creditor. The justice moreover is to inquire whether the prisoner is confined for debt. They cited *Smith* v. *Rice*, 11 Mass. R. 507; *Adkins* v. *Brewer*, 3 Cowen, 206; *Little* v. *Hasey*, 12 Mass. R. 319; *Slacum* v. *Sims*, 5 Cranch, 363; *Davison* v. *Gill*, 1 East, 64; *Brown* v. *Compton*, 8 T. R. 424; *Crepps* v. *Durden*, Cowp. 640; *Squibb* v. *Hole*, 2 Mod. 29; 2 Wils. 385, cites *Smith* v. *Bouchier*; *Case of the Marshalsea*, 10 Co. 76.

Bliss, *contrà*. 1. The notification was good and legal. The objection that the justice of the peace only signed it in blank, would apply to many other processes respecting which the statutes make use of a phraseology similar to that of the one under consideration. *St.* 1797, *c.* 35, § 2; *St.* 1783, *c.* 42. — 2. If the notification was irregular, the two justices have nevertheless said that it was legal, and their determination is final. *Croudson* v. *Leonard*, 4 Cranch, 434; *Sanford* v. *Nichols*, 13 Mass. R. 288; *Baxter* v. *New Eng. Mar. Ins. Co.* 6 Mass. R. 277. If the cause were to go back to the jury, parol evidence could not be admitted to contradict the notification, which recites that application had been made to the justice. *Reed* v. *Jackson*, 1 East, 357; *Purrington* v. *Loring*, 7 Mass. R. 392; *Davis* v. *Maynard*, 9 Mass. R 246.

April 3d.

PARKER C. J. delivered the opinion of the Court. The issue tried by the jury was, whether notice had been given to the plaintiff of the time and place appointed to administer

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the poor debtors' oath; and the certificate of the justices who administered the oath, together with the notification purporting to be signed and made by Joseph H. Pierce, a justice of the peace duly authorized thereto, were tendered and received as evidence of the fact. By the certificate of the two justices who administered the oath it appears, that they have examined the return of the notification made by the officer who served it, and found it conformable to law. The certificate must be conclusive evidence of that fact, for it is made by the statute the special duty of the magistrates to examine the return. The case therefore rests altogether upon the position taken by the plaintiff, that the certificate of the magistrates was void, because they had no jurisdiction of the case, and no right to act, for want of legal proceedings made necessary by the statute before they are called upon to exercise any authority. The notification is unobjectionable in its form; it was signed and sealed by Pierce, who at the time, held a commission of justice of the peace, which was in force. The evidence which was received to contradict this official act was, that Pierce, at the time it bears date, and for a long time before, and until after the day purporting to be assigned for administering the oath, was not within the commonwealth, but was at Washington.

The case presented for the determination of the Court, therefore, is, whether his official certificate of the application to him by the gaoler in behalf of the confined debtor, and of the assignment of a time and place for the hearing, and notice thereof to the creditor, which was served upon the creditor in the manner and within the time prescribed by law, can be rendered null and void by parol evidence that the justice was absent at the time, so that he could not, in point of fact, have personally made out or filled up the notification which bears his signature and seal. As the authority and jurisdiction of a justice of the peace are limited by the county within which he dwells, and for which he is commissioned, unless he be a justice of the peace throughout the commonwealth, it seems to be immaterial to the question, whether the magistrate was at
407 the distance of five hundred miles or of one mile, provided he were without the limits of his county. If he were in the town

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of Roxbury, or at Lechmere's Point, when the certificate or notification issued, he was beyond his jurisdiction as much, to all legal purposes, as if he were at Washington; and indeed the argument for the plaintiff proceeds upon this ground; for it is contended that there must be a personal application to the justice, and that the act to be done is a judicial act, requiring his personal presence, and which cannot be delegated. If it ought to be considered in this light, it would certainly follow, that the notification which was acted upon in this case was void. But it is very clear that, in this respect, the act required of him by law is merely ministerial. He cannot refuse to issue a notification, when application is made to him by the gaoler; he is to act forthwith, without any hearing of parties upon the subject; he is only to appoint a time and place for a hearing before another tribunal. There is nothing of a judicial character in all this, any more than in issuing a *subpœna* for witnesses, or a writ or other process returnable before himself. In *St.* 1797, *c.* 35, § 2, [see Revised Stat. *c.* 94, § 15,] it is provided, that when either party in a cause shall *apply* to a justice of the peace to take a deposition, he shall give notice to the adverse party, &c., and the form of this notice is prescribed. It would be an unusual strictness to inquire whether an application was in fact made to the justice, or whether the blanks in the form of the notice prescribed, were filled up by him, or by some clerk, or even by the party himself in the absence of the justice. The case cannot be distinguished in principle from all other cases of initiatory process, such as original writs, summonses, *subpœnas*, which having the proper signature, and seal, if one be required, have been considered, according to immemorial usage, as the legal acts of courts, clerks, justices, &c., although in fact issued in blank, and in almost all cases filled out by the party who wishes to use them, his agent or attorney. Nor is there any injury resulting from this practice, for the whole object of the process is to compel an appearance, or to give notice of something to be done at a future day; and if that notice is given within the prescribed time, and in the forms required, the party to be affected has no ground of complaint. 408
In such a process as the one which has raised this question, it

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might be particularly inconvenient to admit proof of the temporary absence of the justice upon whose notification two justices are empowered to inquire into the right of a poor debtor to be discharged upon taking the oath; and the custom of leaving blanks, to be filled up by the gaoler or other person, is in no respect productive of mischief. The time allowed the creditor after service of the notification is fixed by law; the manner in which it shall be served is also prescribed. If an inconvenient hour or place should be assigned, the justices of the quorum, who are to act upon the notification, are to examine the return, and it is in their discretion to refuse to act, if they shall find any attempt has been made to put them or the creditor to inconvenience. It is before them that the creditor is to have his hearing, and there he may object to the notice, as well as to the merits of the application by the debtor. If he refuses to appear, or appearing, does not object, he ought not to be allowed, after such an acquiescence, to complain of the proceedings, and resort to the sureties for the whole penalty of the bond, on the ground that an escape has been committed.

The authorities cited show, that where there is no jurisdiction, the proceedings may be avoided by plea or evidence.[1]

Judgment according to the verdict.

COMMONWEALTH *versus* JAMES LOW.

A town may acquire a right of way by grant, and exclusive uninterrupted user by the inhabitants for twenty years, unexplained, is evidence of a grant; but such way will be a private way, and a nuisance on it will not be indictable.

A public town way can be established only in the mode prescribed by *St.* 1786, *c.* 67 and a record of the establishment of such a way cannot, it seems, be presume from a user for any length of time.

INDICTMENT for a nuisance in erecting a fence on an ancient
409 town way of the town of Chelsea, legally established, which was connected towards the west with another town way, and towards the east with the Greens' farms, over which first men-

[1] See *Hall* v. *Young*, *ante*, 2, note; 82 Stark. Evid. (5th Amer. ed.) 705.

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tioned town way all the inhabitants of the town and commonwealth have been used and accustomed to pass with horses, &c., at their own good will and pleasure.

It was proved, on the part of the commonwealth, that the way in question had been known for sixty years; that the Greens' farms, Butman's estate, and all the land to which the way led and over which it went, was originally the property of persons by the name of Hasey; that there was no other way to the farms mentioned, and no other way, till within a few years, to the burying-ground; that there were bars across the way at one or more places, which were taken down and put up as persons passed; that the farms were considerably to the east of that part of the way which was opposite to the burying-ground; that, as appeared from entries which were claimed to be town records, the Greens and Butman, in 1780, 1796, and 1808, on special application to the town, were suffered to work out their highway taxes in those years on this way.

The erection of the fence was admitted by the defendant, who claimed under a deed to his grandfather, W. Low, in fee, from D. Jenkins, dated June 17th, 1761, of a tract of land containing the *locus in quo*, which tract is therein described as bounded southerly, "partly on land of the widow Hasey, being a bending line, measuring twenty-six rods and a half," and which bending line is the southern boundary of the way in question. The same deed purports to convey another parcel of land, and subsequently contains these words, — "together with all the rights, &c., and also the privilege of watering at a large spring in Mr. Jacob Hasey's land, a few rods to the southward of the first mentioned piece of land, &c., and also the privilege of draining the first mentioned land through J. Hasey's land, saving and reserving to the heirs of William Hasey, and to the heirs and assigns of Deacon Jacob Hasey, the privilege of a way by the side of the southerly line or crooked side of the first parcel of land before described, through gates or bars, and also a convenient privilege in the same land to the town of Chelsea for burial of the dead." 410

The defendant gave evidence that gates or bars had been kept up on this way, from time immemorial, as well at the entrance from the other way as at two other places, and that

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originally his whole land, north of the south bound of the way in question, lay open and unfenced; and he contended, that the deed referred to explained the origin of the prescription set up, and in connexion with the fact of the gates or bars being kept up and continued to the present time, negatived any dedication of the way to the public, and prevented its being such a free public way, whereon erecting a nuisance was indictable; that all which was reserved in the deed was a convenient privilege to the town for burial of the dead, which privilege was not alleged to have been diminished by the defendant, and which had always been qualified by the privilege in himself of draining his own land through J. Hasey's land, which is next south of his own, or of the way in question, to the detriment, of course, the whole time such draining might last, of the privilege of burying or of passing that way to the burying-ground; that if such privilege involves a right in the town, the right is confined to that purpose, and extends therefore only to the part of the way opposite to the burying-ground, and not to the Greens' farms, which are beyond that part.

It was objected, that there was a variance between the way alleged and the one proved by the commonwealth; that it was not competent, in this State, to prove a public way by prescription, and that if it were, a prescriptive way was not properly set forth in the indictment.

On this evidence, *Wilde* J., who tried the cause, was inclined to the opinion, that the way used as before mentioned was not a public highway; but in order to bring the question before the whole Court, he instructed the jury that they might consider it as a public town way. They accordingly found a verdict for the commonwealth. If this direction was wrong, the verdict was to be set aside, and by the agreement of the attorney for the commonwealth, a *nolle prosequi* to be entered.

4 1 March 18th

Davis, Solicitor-general. This way may be proved by prescription. A way may be by prescription or grant, and indictment lies for not repairing it. Com Dig. *Chimin D*, 2, 7; *Commonwealth* v. *Charlestown*, 1 Pick. 188. The inhabitants of a town may prescribe for a way, as well as in-

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viduals *Commonwealth* v. *Newbury*, 2 Pick. 59. The statute providing a mode of laying out town ways is cumulative. The gates and bars do not prove this to be a private way, for the public may take a way subject to such an incumbrance. 1 Russell on Crimes, 461 ; *Prov. St.* 5 *W. & M. c.* 8, § 4 ; *St.* 1786, *c.* 81, § 5. A grant of a right of way may be presumed after an uninterrupted use for twenty years. *Hill* v *Crosby*, 2 Pick. 466. This way having been used by the town for sixty years, and having been repaired at their expense, a foundation is laid for presuming that there was once a record of the laying out, which has been lost by time and accident. *Sumner* v. *Child*, 2 Connect. R. 610, 611, 616, 618, 628 ; *Read* v. *Brookman*, 3 T. R. 158 ; *Mayor of Hull* v. *Horner*, Cowp. 110 ; *Roe* v. *Ireland*, 11 East, 284 ; *Goodtitle* v. *Baldwin*, ibid. 488. The deed from Jenkins to Low does not explain the origin of the way. The town moreover was not a party to it, and it cannot affect public rights previously existing. The reservation to the town was only of a place of burial ; it has no reference to a way. An indictment lies for a nuisance upon a town way. *Commonwealth* v. *Gowen*, 7 Mass. R. 378.

Townsend, for the defendant. The deed does not warrant the inference drawn from it, for there has been no burying in the land conveyed. There cannot be a town way by prescription. *Commonwealth* v. *Newbury*, 2 Pick. 57. Where the origin of a right is shown, there is no room for prescription ; and here the deed shows the origin of this way. The argument respecting the gates and bars would be just, if they had been put up by the town, but they were erected by individuals. The case of *Commonwealth* v. *Gowen* had relation to a town way laid out according to the statute. This is not a way common to all the citizens of the commonwealth, but a private way, and a nuisance upon it is not indictable.

412 *April 3d.*

Morton J. delivered the opinion of the Court. The only question presented for our consideration, in this case, is the legal existence of the way described in the indictment.

No record of the laying out of the way by the selectmen of Chelsea, in the manner prescribed by *St.* 1786, *c.* 67, is produced. But it is contended, that although no such record

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can be found, yet that the lawful establishment of the way may be presumed from the long use of it, as proved upon the trial

Ways of various kinds may be proved, not only by prescription, but by a continued and uninterrupted use of them for a period much within the memory of man. And it cannot be doubted, that public highways may be shown by evidence of a user, as well as by the record of their laying out. But whether the same principles apply to town ways, is a question about which, on several occasions, intimations have fallen from the Court, but which has never been directly decided.

In the case of *Commonwealth* v. *Newbury*, 2 Pick. 57, the Chief Justice, in giving the opinion of the Court, observes, that "it is difficult to conceive how a town way, merely as such, can be established in any other manner than by laying out for that particular use by the selectmen of the town, by virtue of the statute respecting highways. It seems to be intended by the legislature, that no such ways shall acquire the character of private town ways, except in the form therein provided, and especially by the express allowance of the inhabitants in regular meeting assembled." This statute gives to town ways, laid out in pursuance of it, in some respects, the character of public highways. It imposes upon the town the duty of keeping them in repair, and renders it liable to indictment for a neglect of this duty. It declares obstructions upon town ways public nuisances, and renders those, who create them, liable to criminal prosecutions. And they are open to all the citizens of the commonwealth, as well as to the inhabitants of the particular town by which they are laid out.

There is no doubt that the inhabitants of a town, in their corporate capacity, are capable of taking an easement, or
4 S other incorporeal hereditament, and that they may become seised of a right of way by grant, prescription or reservation. A grant also may be presumed from continued occupation, as well in favor of a corporation as of an individual.

If the inhabitants of Chelsea have exclusively and uninterruptedly used and enjoyed the way described in the indictment, for more than twenty years, it may warrant the pre-

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sumption of a grant. Whether the evidence in this case proves such a use, may, perhaps, be well doubted; but from the view which we take of the law it is unnecessary to decide this question.

If a grant of the way be presumed, it will not support the indictment. It will operate in favor of the town only, and will give no right of passage to any but the inhabitants. It will be technically a private way, and any person other than an inhabitant passing upon it will be a trespasser. If obstructed, no indictment will lie for the obstruction, nor will the town be liable to punishment for neglecting to repair it.

We do not perceive how the record of the establishment of such a town way as is contemplated by the statute, can be presumed from a user of any length of time. If it be used exclusively by the inhabitants of the town, the presumption will be of a grant of a way to the town, which will be strictly a private way, and will not support this indictment. If it be used by the inhabitants of the town in common with other citizens of the commonwealth, it will raise a presumption that the way is a public highway.

Whether in this commonwealth a public highway may be acquired by *dedication* or not,[1] it is very manifest that a town way cannot be thus acquired. The use of it by the inhabitants of a town, if exclusive, might prove a grant to the town, but would negative a dedication to the public; if not exclusive, it would prove it a common highway, and not a town way.

We are therefore of opinion, that a town way can be established only in the mode prescribed by *St.* 1786, *c.* 67, [see Revised Stat. *c.* 24, § 66, *et seq.*] and that there is no evidence that the way in question was so established.[2]

Verdict set aside and a nolle prosequi entered.

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[1] See *Hinckley* v. *Hastings*, 2 Pick. (2d ed.) 164, note.

[2] See Revised Stat. *c.* 25, § 26. See also *Todd* v. *Rome*, 2 Greenl. 55; *Rowell* v. *Montville*, 4 Greenl. 270; *Estes* v. *Troy*, 5 Greenl. 368; *Jones* v. *Andover*, 9 Pick. 146.

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The President &c. of the City Bank *versus* Henry Cutter *et al.*

A tender by the indorser of a promissory note, on the day next after it has become due, is not sufficient, without a tender of interest.

No protest is necessary upon the dishonor of a promissory note, and notarial fees cannot be recovered of the indorser.

The day of commencement at Harvard College is not a holiday; but a usage of any bank, in respect to notes falling due on that day, to make a demand on the maker and give notice to the indorser on the day preceding, will be binding on an indorser of a note discounted for him at the bank, who is conusant of such usage; and whether the note is made payable at such bank or not, is immaterial.

In an action on a note discounted by a bank against an indorser conusant of the usage of such bank, an allegation of a presentment and demand on the maker is supported by evidence of a written demand being left at his place of business according to such usage.

Assumpsit against the defendants as indorsers of two promissory notes made by Wentworth & Low, of Boston, and negotiated to the plaintiffs by the defendants.

One of the notes was made on the 22d of April, 1824, for the sum of 510 dollars, payable in four months with grace. The declaration alleged that it was presented to the makers and payment demanded.

In respect to this note, Andrew Johonnot, a clerk in the City Bank, testified, that the third day of grace falling on the 25th day of August, which was the day of the annual commencement at Harvard College, and a holiday on which no business was done at the bank, he on the 24th made out a written demand on the makers and a notice to the indorsers, bearing date of the 25th; that on the 24th, in the afternoon, after the usual hours of business at the bank, he went to the store of Wentworth & Low, in Boston, and finding the door closed, he put the demand on them under the door and into the store; and that immediately afterwards he went to the store of the defendants in Boston, and finding the door shut, he put the notice for them under the door. The witness further testified, that it had been the invariable custom of the City Bank to suspend all business on commencement day, and that when notes fell due on that day, it was the practice
415 to give notice on the day preceding, as in cases where they became due on Sunday; that he understood this to be

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the custom of the other banks in Boston, and that he knew it was their custom not to do business on commencement day, nor on the days of election, fourth of July, and Christmas, all of which were regarded as holidays.

Joseph Chapman, cashier of the Boston Bank, testified that it was the custom at that bank, and at all the banks in Boston, to consider the days before specified, as holidays, and when a note falls due on one of them, to give the notice on the day preceding; but that it was common at the Boston Bank to write on the back of the notice, that the next day being a holiday, no business would then be done at the bank. He also testified that the defendants had done business at the Boston Bank for many years.

Matthew S. Parker, cashier of the Suffolk Bank, testified that it was the custom with the banks in Boston, and particularly the Suffolk Bank, to treat notes falling due on either of the days in question, precisely as if they had fallen due on Sunday; that it was most usual to date the notifications, in such cases, of the day when they were delivered, but that they sometimes bore date of the third day of grace.

John Pickens, cashier of the City Bank, testified in a similar manner as to the general custom of the banks in Boston, and also stated that the defendants had done business at the City Bank and had had frequent discounts there.

James Dalton, cashier of the Manufacturers and Mechanics Bank, a witness on the part of the defendants, testified that the usage at that bank was, when a note falls due on a holiday, to make the notification bear date of that day, and to direct the messenger to deliver it on the day of the date, and unless the note is made payable at the bank, to present the note with the notification; that when a note falls due and notice is given on a holiday, the fact is noted on the back of the notification; and that the bank is not open on such days.

Lincoln J. instructed the jury, that if they were satisfied that it was a general custom with the banks in Boston to regard commencement day as a holiday, and when notes fall due on that day, to give notice to makers and indorsers on the day previous, as in the case of their falling due on Sunday,— or if 416

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they were satisfied that such was the particular custom of the City Bank, and this expressly known to the defendants when they negotiated the note,—the defendants would be bound by the custom, and the jury would consider the demand on the makers and the notice to the defendants as seasonably and properly made; but that if they were not satisfied of this general custom, or of a particular custom of the City Bank expressly made known to the defendants, the verdict should be for the defendants.

The verdict was for the plaintiffs; but if the Court should be of opinion that the demand on the makers, or the notice to the indorsers, was, in manner or time, insufficient or unseasonable, or that the evidence was inadmissible under the declaration, a new trial was to be granted.

The other note in suit was given for the sum of 480 dollars, and fell due on the 28th of September, 1824. The defendants pleaded a tender of the sum of 480 dollars on the 29th of September. The plaintiffs replied that they ought not to be barred by reason of the tender, for that on the 28th of September a demand of payment was made on the makers, and payment not being made, the plaintiffs on the same day duly notified the defendants thereof, and required payment of them; that the defendants thereupon did not pay the note, and the plaintiffs afterwards, on the same day, caused it to be noted for protest by a notary public, and due notice thereof to be given to the defendants on the same day. To this there was a general demurrer

March 18*th*. *A. Townsend*, in support of the demurrer, contended, that an indorser of a note is entitled to a reasonable time, after notice of its dishonor, to make payment, and that as the defendants had no opportunity to pay the note on the 28th of September, the notice having been given after the bank had closed, the tender on the next day was sufficient, without an offer to pay any interest. Chitty on Bills, (6th ed.) 232, cites *Walker* v. *Barnes*, in 1 Marshall, 36, and 5 Taunt. 240. Neither was the bank entitled to demand the notarial expenses; for an inland bill or a promissory note is not required to be

417 protested. *Leftley* v. *Mills*, 4 T. R. 175; *Windle* v. *An*

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drews, 2 Barn. & Ald. 696; *S. C.* 2 Stark. R. 425; *Miller* v. *Hackley*, 5 Johns. R. 375; *Young* v. *Bryan*, 6 Wheat. 152; *Union Bank* v. *Hyde*, ibid. 573.

In regard to the note for 510 dollars, the averment in the declaration is, that it was presented to the makers for payment; but the evidence went to excuse the want of a presentment; which is a fatal variance. Chitty on Bills, (4th ed.) 465; *Blakeley* v. *Grant*, 6 Mass. R. 388. The notifications were dated the 25th of August, but if the note was due on the 24th, they should have been dated on that day. In truth, however, commencement day does not reduce the time of payment, as expressed in a bill of exchange or promissory note. So of the two days of election and the fourth of July. A reducing day must be one which affects the whole commonwealth, making it obligatory in law, or in conscience, to refrain from doing business on such day. Chitty on Bills, (4th ed.) 341, 277; *Lindo* v. *Unsworth*, 2 Campb. 602; Bayley on Bills, (Phil. and Sewall's ed.) 172; *Farnum* v. *Fowle*, 12 Mass R. 91; *Jackson* v. *Richards*, 2 Caines's R. 343; *Griffin* v. *Goff*, 12 Johns. R. 423. No general usage of the banks was proved, nor was the note in question made payable at any bank, and the usage of this particular bank cannot bind the defendants.

S. K. Williams, for the plaintiffs, cited, in regard to the tender, *Shed* v. *Brett*, 1 Pick. 401; *New England Bank* v. *Lewis*, 2 Pick. 128. The safest mode of making a demand and giving notice, is by the intervention of a notary, and it is but reasonable that notarial fees should be allowed. In *Nichols* v. *Webb*, 8 Wheat. 326, a notary's book of records was held admissible evidence after his death, to prove a demand on the maker and notice to the indorser. It is customary with the United States Bank and the banks at Nantucket to have promissory notes protested. The proof here supports the allegation of a presentment and demand; *Stewart* v. *Eden*, 2 Caines's R. 121; and besides, the declaration contains a count for money had and received. *State Bank* v. *Hurd*, 12 Mass. R. 172. Whether the note for 510 dollars was due on the 24th or on the 25th of August, is immaterial, for if commencement day was not a holiday, still the notice was

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given according to the usage of the bank, known to the defendants, and they might have paid the note the day after commencement. *Lewis* v. *Burr*, 2 Caines's Cas. in Err. 195; *Blanchard* v. *Hilliard*, 11 Mass. R. 85; *Whitwell* v. *Johnson*, 17 Mass. R. 152; *Renner* v. *Bank of Columbia*, 9 Wheat. 582.

April 3d. PARKER C. J. delivered the opinion of the Court. We are of opinion that the plea of tender is bad, the tender not having been made until the day after the debt became due against the defendants by means of the notice to them of non-payment by the maker of the note.[1] The doctrine of a reasonable time for the indorser to pay, has not been received and acted upon in this country, and is doubted by the highest authority on this subject in England. Our doctrine, as established in the case of *Shed* v. *Brett*, and indeed always practically recognised, is, that the suit may be brought on the very day the note becomes due, after demand and notice, for there is then a breach of the promise.[2] If the note is not paid during the business hours of the day, if the money is to be paid into a bank, a right of action has accrued. Whether a tender at any time during that day to the holder would be sufficient, this case does not call on us to decide.

We are also satisfied, that the notarial fees could not have been demanded, if the tender had been seasonable and sufficient in other respects, because the agency of a notary is not necessary, however it may be for the convenience of the parties.

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[1] In strictness a plea of tender is applicable only to those cases, where the party pleading it has never been guilty of any breach of his contract. *Hume* v. *Peploe*, 8 East, 168; *Frazier* v. *Cushman*, 12 Mass. R. 277. See *Rose* v. *Brown*, Kirby, 293.

The law in this respect is altered in Massachusetts, so that the payment or the tender of payment of the whole sum due on any contract for the payment of money, although made after the money has become due and payable, may be pleaded to an action subsequently brought, in like manner and with like effect as if such payment or tender had been made at the time prescribed in the contract. Revised Stat. *c.* 100, § 14.

By the common law and the practice of Connecticut, a tender of a debt is good, though the day of payment has elapsed. *Tracy* v. *Strong*, 2 Connect. R. 659.

[2] See *Greeley* v. *Thurston*, 4 Greenl. 479; *Crenshaw* v. *M'Keirnan*, 1 Minor, (Ala.) 173; Bayley on Bills, (Phil. and Sewall's 2d ed.) 345; *Wilson* v. *Williams*, 1 Nott & M'Cord, 440. But see *Osborne* v. *Moncure*, 3 Wendell, 170.

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We think the counsel for the defendants has satisfactorily shown by authorities, that commencement day cannot be enforced as a day of reduction of the credit on a note, oy the general principles of law.[3] It is not in the language of the common law a holiday, though it is a day of festivity and amusement in the neighbourhood of the university. But it is a fit subject of a usage, which will bind all those dealing with a bank which has adopted it as a day when business is not there to be done. It is found to have been the usage of the City Bank to regard it in this light, and the report finds that the defendants had express knowledge of this usage. And so 419 also as to the manner of the notice and of the demand.

In regard to the supposed variance, we think the objection not tenable. It is held, that if the plaintiff avers that he presented a bill or note and demanded payment, this allegation will not be proved by evidence that the party had absconded, so that the demand could not be made upon him. This is because the fact proved renders a demand unnecessary, and of itself makes an indorser or drawer liable. The case before us is different. An independent fact which is to answer instead of a demand, is not found, but a demand is proved in a form which has been agreed upon by the party to be affected by it, that is, that there is a usage as to this form of demand, to which usage he has given an implied assent. The case of *Jones* v. *Fales*, which stands at the foundation of the law in this commonwealth, and by which hundreds of cases have since been decided, is entirely decisive of this case on this point. In that case the averment, and the evidence to support it, were the same as in this.

We think the note's not being payable at the City Bank makes no difference, as it was there negotiated. On this point also the case of *Jones* v. *Fales* is conclusive.[1]

Judgment according to verdict.

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[3] The holder of a dishonored note is excused from giving notice of nonpayment to the indorser on the *fourth of July*. *Cuyler* v. *Stevens*, 4 Wendell, 566.

[1] See *Weld* v. *Gorham*, 10 Mass. R. (Rand's ed.) 367, n. (a); *Bank of Washington* v. *Triplett*, 1 Peters, 25; *Renner* v. *Bank of Columbia*, 9 Wheat. 581.

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CAROLINE B. FANNING *versus* DAVID CHADWICK Junior.

Though a tenant in common or partner may now have relief in equity against his cotenant or copartner, under St 1823, c. 140, yet if the joint interest is determined or the partnership dissolved, all accounts and liabilities being settled and discharged, and a balance remains due from one cotenant or copartner to another, it may be recovered in an action of *assumpsit*, and without any express promise.

The plaintiff and defendant being part owners of a vessel, of which the defendant was master, and being jointly concerned in a whaling voyage, undertaken by such vessel, the defendant, in the course of the voyage, landed some prisoners from a privateer, and also saved some articles from a wreck; for each of which services he received a compensation. On his return he settled up the voyage, but without rendering any account of these two items of compensation. *Held*, that the plaintiff might recover her proportion of the same in the form of *assumpsit*.

ASSUMPSIT on account annexed, and for money had and received. The action was brought to recover an eighth part of the proceeds of two certain adventures growing out of a voyage undertaken in a vessel, three fourths of which were owned by the defendant, one eighth by the plaintiff, and one eighth by J. B. Fanning, and of which the defendant was master for the voyage.

The vessel sailed on a whaling voyage, and during the prosecution thereof, the defendant took some prisoners from on board a South American privateer, at the request of her commander, and landed them at an island on the coast of Africa; for which he received a compensation. During the same voyage the vessel was employed in saving property from a French ship, that had been wrecked; for which also he received a compensation. Of these two items the plaintiff claimed her proportion, as the owner of one eighth of the vessel.

A verdict was returned for the plaintiff; which was not complained of, if by law the action in this form could be supported.

The objection was, that all the owners being partners, *assumpsit* would not lie, but an action of account should be brought. On the return of the vessel, the account of the whaling voyage was settled according to the usage of such voyages, but no account was rendered of the two items above mentioned, nor did it appear, that when the account was

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settled, the plaintiff knew that any claim existed for those items. On the settlement of the whaling voyage, the plaintiff received the balance due, and gave a receipt in discharge of the account. Afterward she frequently demanded her proportion of the items in question; but the defendant refused to pay any thing, or to render any account, saying that what he received in relation to the transportation of prisoners was on his own account, and that the same, together with all that he received for salvage, was appropriated to the use of the vessel, except what was distributed among the sailors.

If the form of the action was right, judgment was to be entered upon the verdict; otherwise a new trial was to be granted.

L. Shaw, *W. Phillips*, and *Sewall*, for the defendant, now insisted that the plaintiff's remedy was an action of account, or of the case in nature of account, or a bill in chancery, the plaintiff and defendant standing in the relation of copartners. The general rule is, that one partner or tenant in common cannot sue his copartner or cotenant in *assumpsit*; and this principle applies, not only to general partners, but also to partners in a particular transaction. 1 Chit. Pl. 25; *Smith* v. *Barrow*, 2 T. R. 476; *Harvey* v. *Crickett*, 5 Maule & Selw. 339; Gow on Partn. 117; *Robson* v. *Curtis*, 1 Stark. R. 78; *Murray* v. *Bogert*, 14 Johns. R. 322. There are some exceptions to this rule, as where there has been a settlement between the partners and a balance struck, and an express promise by the defendant to pay the balance; *Casey* v. *Brush*, 2 Caines's R. 293; *Ozeas* v. *Johnson*, 1 Binney, 191; *Halstead* v. *Schmelzel*, 17 Johns. R. 80; or where money, not being partnership property, is received by the defendant for his copartner; *Smith* v. *Barrow*, before cited. It will be said, that whatever may be the law elsewhere, this Court has adopted a different doctrine. But the case of *Brigham* v. *Eveleth*, 9 Mass. R. 538, had relation to a tenancy in common of a particular chattel, as to which there has been some relaxation of the general rule; and in *Jones* v. *Harraden*, ibid. 540, note, all that was necessary to be decided was, that if a tenant in common of a chattel sells it, he is liable to his cotenant for a part of the proceeds. In *Wilby* v. *Phinney*, 15 Mass.

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R. 116, the Court recognise the general rule. That case presented many difficulties, arising out of *St.* 1799, *c.* 57, which allows a creditor of a partnership to sue the executor or administrator of a deceased partner. The Court there saw no remedy for the plaintiff, who was a surviving partner, but to permit him to recover a judgment, to be filed before the commissioners on the estate of his copartner, who had died insolvent. The authority is applicable only under those peculiar circumstances. In *Bond* v. *Hays, Executor*, 12 Mass. R. 34, there had been an overpayment by mistake, after the dissolution of the partnership, and the action was brought to recover back the excess. If the Court have formerly been induced, by the hardship of the case, to relax the strict rules of law, it will not go any further, now that there is an adequate remedy in chancery in cases of partnership. The doctrine we contend for is applicable to joint owners of ships. 3 Chitty's Laws of Commerce &c., 262; 1 Holt on Shipping, 371; Montague on Partn. 178; *Doddington* v. *Hallet*, 1 Ves. sen. 497; Abbott on Shipping, 97 *et seq.*; *Ex parte Christie*, 10 Ves. 105; *Schermerhorn* v. *Loines*, 7 Johns. R. 311; *Muldon* v. *Whitlock*, 1 Cowen, 290; *Mumford* v. *Nicoll*, 20 Johns. R. 611. But whether it be so or not, a joint ownership in such a voyage constitutes a partnership, and the reasons apply as strongly here as in other kinds of partnership. There must be an account for fitting out, bartering and selling the oil, and making up the voyage. If the compensation received by the defendant for the transportation of passengers, was not a mere personal gratuity, as he considered it, then the seamen are entitled to their shares, and the defendant should have the benefit of all equitable deductions. Our objection is not one of form; it goes to the merits. The plaintiff had no right to bring her action for a particular item; she ought to sue for a general balance. A partner might with equal propriety sue for his proportion of a particular bale of goods. The action should be such as will produce a final settlement. Had this been an action of account, the Court would have
423 appointed competent auditors; but the present form of action brings the case before a jury, which is a tribunal not well qualified to enter into investigations of intricate accounts, and

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moreove. leprives the defendant of the benefit of his own oath in accounting.

Thacher and *Warner*, for the plaintiff, relied on the cases already cited from Massachusetts Reports, and observed that the action was commenced before the enactment of the statute giving chancery powers to the Court in cases of partnership.

April 3.

WILDE J. delivered the opinion of the Court. Without determining whether, upon the facts reported, the parties are to oe considered as standing in the relation of copartners, or not, we are of opinion that this action may be well maintained. It is true, generally, that a partner or tenant in common cannot sue his cotenant or copartner in an action in form *ex contractu*, for a share of the common property, or profits received. But if the joint interest is determined, or the partnership is dissolved, all accounts and liabilities being settled and discharged, and a balance remains due from one cotenant or copartner to another, it may be recovered in an action of assumpsit. It is said that an express promise is necessary, and such seems to be the English doctrine. But a contrary doctrine has been repeatedly laid down by this Court. *Jones* v. *Harraden*, *Brigham* v. *Eveleth*, *Bond* v. *Hays*, and *Wilby* v. *Phinney*, cited in the argument.[1]

The doctrine laid down in these cases appears to us most reasonable, and we consider it now as well established. It was admitted by the counsel for the defendant in the case of *Wilby* v. *Phinney*, and was expressly laid down by the Court as a settled principle.

It is true that case was decided on its peculiar circumstances, but the principle in question was involved in the decision. *Phinney* was administrator of a deceased partner of *Wilby*, whose estate was insolvent, and the Court held that the plaintiff's demand was in nature of a final balance, although the accounts of the partnership were not closed. For it was final as to the plaintiff, he having no further remedy, in any event, against the estate of the deceased partner. On this ground

[1] See also *Williams* v. *Henshaw*, 11 Pick. 79, and 12 Pick. 378; *Brinley* v. *Kupfer*, 6 Pick. 179; *Johnson* v. *Ames*, 6 Pick. 330; *Chandler* v. *Chandler*, 4 Pick 82; *Haskell* v. *Adams*, 7 Pick. 59; *Stiles* v. *Campbell*, 11 Mass. R. 321.

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it was held that he was entitled to recover as for a final balance.

This case, therefore, as well as the other cases cited, is directly in point; and we see no reason for overruling these decisions, notwithstanding relief may now be had in equity. Besides, this action was commenced before the statute for this purpose was enacted. But had it been otherwise, we should still feel bound to adhere to former decisions. When a plain, convenient, and adequate remedy may be had at law, a party ought not to be turned over to a suit in equity. It has been argued that the only remedy at law, if any, is by action of account; but this action is almost obsolete even in England, and there seems to be no necessity for reviving it here. Justice may be administered in a form more simple and less expensive, by an action of *assumpsit*; especially since the Court is authorized to appoint auditors. *Assumpsit* now has all the advantages, without the disadvantages, peculiar to an action of account.

For these reasons we are of opinion the plaintiff is entitled to recover, the voyage having been completely settled by the parties, except as to the items sued for in this action.[1]

Judgment according to the verdict.

[1] See *Brigham* v. *Eveleth*, 9 Mass. R. (Rand's ed.) 542, n. (*a*); *Wilby* v *Phinney*, 15 Mass. R. (Rand's ed.) 121, n. (*a*); *Bovill* v. *Hammond*, 6 Barn. & Cressw. 149; *S. C.* 9 Dowl. & Ryl. 186; *Clarke* v. *Glennie*, 3 Stark. R. 10; *Fromont* v. *Coupland*, 2 Bingh. 170; *Westerlo* v. *Evertson*, 1 Wendell, 532; *Andrews* v. *Allen*, 9 Serg. & Rawle, 241; *Kennedy* v *M'Fadon*, 3 Harr. & Johns. 194; *Causten* v. *Burke*, 2 Harr. & Gill, 295; *Roache* v. *Pendergast*, 3 Harr. & Johns. 33; *Barger* v. *Collins*, 7 Harr. & Johns. 213.

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WILLIAM MOODY *versus* DANIEL WEBSTER.

An insurance broker, who receives premiums and pays losses, has a lien on the policies and abandonments in his hands, for a general balance against the underwriter.

Where the underwriter became a bankrupt, and the insurance broker, having a balance due to him for losses paid, did not present his claim under the commission of bankruptcy, but retained in his hands the policies and abandonments, and afterwards, as a remuneration for the losses, a sum of money was paid, under the treaty with Spain of February 1819, to a third person for the benefit of all parties interested, it was *held*, that the insurance broker had a lien on such sum.

ASSUMPSIT for money had and received. The case came before the Court upon a statement of facts.

Nathan Bond was formerly an underwriter in an insurance office kept by Joseph Taylor. Bond became bankrupt, and the plaintiff was appointed assignee on his estate, under the late bankrupt law of the United States. Taylor kept a running account with Bond of all premiums received and losses paid by him for Bond, the balance of which, on settlement, was found to be in favor of the broker, amounting to more than the sum demanded in this suit. This balance was never paid, nor was it proved under the commission. For some of the losses paid by the broker, as above mentioned, compensation was claimed, for the benefit of whom it might concern, under the treaty with Spain of February 1819, and was allowed and paid to the defendant as agent in this behalf; and the amount is now claimed from him by the executor of Taylor. The commissioners under the treaty made it a rule, not to award compensation to the keepers of insurance offices, but to the owners of the property spoliated, or their assignees, in fact or in law, stating that this general rule, made for convenience, was not to prejudice the right or claim of any other persons to the sums awarded. The policies and deeds of abandonment were retained by Taylor until his decease, and afterwards remained in the hands of his executor, and were produced and furnished by him in support of the claim before the commissioners under the treaty. 425

The question submitted to the Court was, whether the executor of Taylor had such a lien on the policies in his hands, for the balance of the account, as to be entitled to

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apply the proceeds to pay such balance. If the Court should be of opinion that he was so entitled, the plaintiff was to become nonsuit; otherwise the defendant was to be defaulted.

March 22d. *W. Simmons* and *Bliss*, for the plaintiff. It will not be pretended that there was any express pledge in the present case, and we apprehend that there is no lien arising by implication of law from the situation of the broker and underwriter. The broker held the policies for the benefit of the assured, and not of the insurer, and when the losses were paid, the policies became *functus officio* and of no value. If Taylor paid the losses, he did it as attorney to Bond, so that the payments must be considered as made by Bond himself. The remuneration under the treaty was a free gift, and cannot be considered as salvage. There was no way of compelling the government of Spain, or that of the United States, to pay the money, and the mere *spes recuperandi* was not capable of being valued. Phillips on Ins. 465. Admitting that Taylor once had a lien, it was long since at an end, because the debt itself became extinct by Bond's discharge under the bankrupt law. Had the commissioners under the treaty followed their own rule, they would have made their award in favor of Bond as assignee of the assured, and if the money had been paid to him, Taylor's executor could not recover it out of his hands. The written abandonments cannot give a lien, for Bond would have been entitled, as assignee of the assured, without any formal abandonment.

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W. Prescott, *contrà*, cited 1 Cooke's Bankr. Law, 454, 580; Montag. on Lien, 69; Paley on Principal and Ag. 95; *De Gaminde* v. *Pigou*, 4 Taunt. 247; *Baker* v. *Langhorn*, 4 Campb. 396; *Parker* v. *Beasley*, 2 Maule & Selw. 423; *Peele* v. *Northcote*, 7 Taunt. 480.

April 1d. PUTNAM J. delivered the opinion of the Court. It seems to be considered as settled, that a broker has a general lien on policies in his hands. He is entitled to deduct the money due for premiums, out of what he receives on the policies which are put into his hands to collect from the underwriters. *Whitehead* v. *Vaughan*, 1 Cooke's Bankr. Law, 579, 580. And although the broker should part with the policy, if it should come into his hands again, the lien would revive. ibid

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457. If, therefore, this case is to be decided as if Bond, the underwriter, made the claim upon Taylor, the insurance broker, for premiums, it would be clear that Taylor would have a right to deduct what Bond was indebted for losses paid by Taylor, and that he would be liable to Bond only for the balance. And this right of set-off results from the implication of the law touching this subject, and need not be proved by any express agreement.

It has been contended for the plaintiff, that the remuneration under the award of the commissioners under the treaty, is to be considered as independent of the loss, and in the nature of a 427
grant, which belongs to the former owner of the vessel; and not as salvage, in which light the defendant contends it should be considered. But it seems to us that the view which the defendant has taken of the matter, is correct upon that point. It was a satisfaction for the illegal capture, and if it had come to the hands of the broker, it would have been properly an item of account between him and the underwriter.

It is true, that when Bond became a bankrupt, Taylor might have presented and had this claim allowed against his estate. Taylor, however, preferred holding the policies as security; and he might lawfully exercise his own judgment in that respect. He could not, indeed, get any dividend upon the estate; but if, in virtue of his having the policies, he could obtain enough to satisfy his claim, he might properly insist upon that advantage.

This case is to be decided upon general principles applicable to underwriters and brokers as the business is here usually conducted. For the payment by the commissioners has been made without prejudice to the rights of either party.

If this money had been paid to the broker pursuant to a decree of a court of admiralty, it should seem to be clear that it would be subject to his lien. But it makes no difference, in principle, whether it has been recovered in the regular course of judicial process, or in virtue of the stipulations of a treaty. The abandonment and the policy were retained by the broker, and were coupled with an interest; which, so

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far as it concerned the underwriter, should be protected in the hands of the legal representatives of the broker.

There is some confusion in the cases upon this subject, which may be reconciled by considering the nature of the agency of the broker. Where he acts under a *del credere* commission, he may be permitted to set off losses against the claim of the underwriter for premiums, which he would not be allowed to do, if he were acting as a broker without such a commission; because under such a commission he procures
428 policies for his principals in his own name, although as agent, and he is considered, as between the underwriters and himself, as the owner of the policies. And this arises from his increased liability to the assured for the losses. He is in such cases, therefore, permitted to set off losses, in the same manner as he would be if he were the sole proprietor of the property and policies. He is also liable to the underwriter for the premiums in such cases. The underwriter and the assured, in short, treat with the broker having such a commission, as with a principal.[1] But where one effects policies as agent, in his own name, without such a commission and such liabilities, and a loss happens, it belongs exclusively to the principal, and the broker cannot set it off against the premiums claimed from him by the underwriter, unless he should have paid it pursuant to the authority given to him by the underwriter. From thenceforward it would become an item in their mutual accounts, as in the cases cited touching this point.

In the case at bar it does not appear that Taylor had a *del credere* commission; but he paid the losses upon receiving the abandonments, taking and holding the policies as his vouchers and for his security, within the general scope of his authority. And under the circumstances which are agreed, we are all of opinion that the plaintiff should become nonsuit.[2]

[1] Hughes on Ins. 106 to 109; 2 Phil. Ins. 366.

[2] 2 Phil. Ins. 364.

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Isaac Parker, Administrator &c. of Edward Sprague, *versus* Thomas Thompson.

When the question is of the real subject matter of a suit, in order to show a bar to another suit, or to lay the foundation of an action of indemnity, the identity of the cause of action may be averred, and may be proved by other than record evidence.

By a contract made in this State, A engaged "to repay to B, of New Hampshire, any moneys, not exceeding 1500 dollars, which B should legally be compelled to pay to C on account of money received of C on account of, and in part pay for money due on D's bond to B." C recovered of B, in an action brought in New Hampshire, a larger sum than 1500 dollars. *Held*, that the words *legally compelled* meant compulsion by legal process, without reference to the laws of any particular State; that as the particular ground of the recovery in C's action did not, and was not required to appear by the record of the judgment, it might be shown by parol evidence; and that the measure of damages in an action on A's contract should be the 1500 dollars, with interest from the time of a demand made subsequently to the recovery against B.

Covenant. In 1800 Samuel Swett gave a bond and mortgage of certain real estate to the Rev. Edward Sprague, the plaintiff's testator; he made a second mortgage of the same estate to the defendant in 1812; and a third to Abraham Gibson in 1814, to whom in 1816 he conveyed his right of redemption. Sprague afterwards assigned his bond and mortgage to the defendant, who executed a contract under seal, dated at Boston the 24th of January 1817, in which he engages "to refund or repay to the Rev. Edward Sprague, of Dublin in New Hampshire, any moneys, not exceeding 1500 dollars, which he the said Sprague shall legally be compelled to pay to the heirs of the late Abraham Gibson deceased, on account of money which he the said Sprague shall actually have received of and receipted for to said A. Gibson on account of and in part pay for money due on S. Swett's bond to him the said E. Sprague, dated," &c. An action was afterwards brought in the State of New Hampshire by the representatives of Gibson against the representative of Sprague, the declaration in which contained two common money counts, and a special count alleging that 1500 dollars had been paid, but not indorsed, upon the bond, according to Sprague's agreement; and upon a trial judgment was recovered, and an execution was issued for the sum of 2091 dollars 430
50 cents, which was paid out of Sprague's estate. Whereupon

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the present suit was commenced against the defendant, upon his covenant above recited. The defendant pleaded, *secondly*, that Sprague's estate had not been compelled to pay any money to Gibson's heirs, which had been before paid by Gibson to Sprague on the bond and mortgage; and, *thirdly*, that the money recovered had been before paid by Gibson to Sprague for the purpose of purchasing the bond and mortgage, and in part payment of the purchase, and not in part payment of the bond and mortgage. Issue was joined on these pleas.

The plaintiff, to prove these issues, introduced a copy of the judgment recovered in New Hampshire, and of the execution, and proved by a witness, that the amount of the execution was paid out of Sprague's estate. Other evidence, consisting chiefly of depositions and letters, was then offered by the plaintiff, to prove that the judgment was recovered on account of money paid by Gibson to Sprague on the bond and mortgage; to which evidence the defendant objected, but the objection was overruled. It was proved, that the defendant was notified of the action in New Hampshire, and informed that he might conduct the defence if he saw fit. That action was tried several times, and a witness, who was present at the trials, testified that all the material evidence touching the payment of the money by Gibson, and the purpose for which it was paid, was from the testimony of one Pulsifer, whose deposition was in the present case, and from the deposition of one Ingersoll, a copy of which was also in this case and was read to the jury at the trial.

Wilde J. instructed the jury, on the whole evidence, that if they should be satisfied that the money was paid by Gibson on the bond and mortgage, and was received in part payment of the same, and not for the purpose of procuring an assignment to him of the bond and mortgage, they should find all the issues for the plaintiff. And further, that if they found for the plaintiff, they should assess the damages in the sum of 2091 dollars 50 cents, the amount of the execution against Sprague's estate, with interest from the time of payment of that execution.

431 A verdict was found for the plaintiff; but if the parol evidence ought not to have been admitted, or if the instructions

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to the jury were ncorrect, a new trial was to be granted; or if the Court should think the plaintiff entitled to recover, but that the damages were too large, the verdict was to be altered so as to conform with the opinion of the Court.

Prescott and *W. Sullivan*, for the defendant. The plaintiff ought to have produced a record of a recovery against Sprague for the precise cause of action alluded to in the contract, showing that the contingency, which was to render the defendant liable, had happened; and parol evidence was not admissible to prove, that in the action in New Hampshire, any matter was in issue, which did not appear on the face of the record. *Sintzenick* v. *Lucas*, 1 Esp. R. 43; *Manny* v. *Harris*, 2 Johns. R. 24. The Court must know all the evidence used at the trial, the arguments of the counsel, and the instructions of the judge, in order to get at the grounds of the decision in New Hampshire. This is not a formal objection, for the defendant there might have filed a special plea, which would have shown on what point the action turned. But if all the evidence used in that case is admissible here, then the question is, whether this Court would give the same construction to this contract. We apprehend they would not, and that it must be construed according to our laws, being made here and without reference to the laws of any other State. If the money was not paid on the bond, the defendant is not liable on his contract; if it was so paid, then by our laws it could not be recovered back: and if it had been shown, as it ought to have been, in the action in New Hampshire, that it was paid in discharge of a debt, the representatives of Gibson would not have prevailed. Supposing however that the plaintiff is entitled to recover, the damages should not exceed 1500 dollars, with interest from the date of the writ. *Dennis* v. *Cummins*, 3 Johns. Cas. 298; *Lowe* v. *Peers*, 4 Burr. 2228.

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Fletcher, for the plaintiff. The point in issue was, whether Sprague's representatives had been compelled to repay money paid by Gibson on account of Swett's bond. We produced the record of the case in New Hampshire, but that did not show the fact; nor was it necessary that it should, for the plaintiff there was not obliged to declare specially; and if the

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defendant in that action had put in a special plea, it would have amounted to the general issue and been bad on demurrer. It was necessary then to prove the fact by other evidence; and it is clear, that where a fact proper to be proved, need not and does not appear by the record, other evidence is admissible; only such evidence must not contradict the record. *Parks* v. *Hall*, 2 Pick. 206; *Wilson* v. *Hart*, 7 Taunt. 304; *Martin* v. *Thornton*, 4 Esp. R. 180; *Ravee* v. *Farmer*, 4 T. R. 146; *Seddon* v. *Tutop*, 6 T. R. 607; *Webster* v. *Lee*, 5 Mass. R. 334; *Phillips* v. *Berick*, 16 Johns. R. 136; *Stevens* v. *Payne*, 2 Root, 83. The jury in the first action having found a verdict on the evidence now produced, they must have found that the money was paid on account of the bond; for there was no evidence of any contract for an assignment to Gibson. It is objected, that Sprague's representative was not legally compelled to repay the money. Certainly the forms of law were pursued, and it is manifest from the contract itself, that the parties must have understood that any suit against Sprague would be brought in New Hampshire, where he lived. But if the action had been brought here, we have reason to think the result would have been the same, since the bond was assigned to the defendant without any indorsement of the payment in question. *Rowe* v. *Smith*, 16 Mass. R. 306. On the subject of damages, our view is, that 1500 dollars was mentioned only as the principal sum, being the sum paid by Gibson to Sprague, and that the plaintiff is entitled to interest as incident. *Harris* v. *Clap*, 1 Mass. R. 308; *Pitts* v. *Tilden*, 2 Mass. R. 118; *Clark* v. *Barlow*, 4 Johns. R. 183; *Liotard* v. *Graves*, 3 Caines's R. 234; *Pease* v. *Barber*, ibid. 266; *Smedes* v. *Hooghtaling*, ibid. 48; *Gibbs* v. *Bryant*, 1 Pick. 118; *Wood* v. *Robbins*, 11 Mass. R. 504.

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PARKER C. J. delivered the opinion of the Court. This case depends principally upon the true construction of the covenant declared on. We can see but one meaning to the

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words, without imputing a degree of artifice on the part of the defendant, which it is not probable he practised. Whatever he shall be legally compelled to pay, means whatever by legal process he shall be obliged to pay, without reference to the laws of any particular State. If, as is contended, the par-

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nes meant that the defendant should repay, only in case by the principles of law in Massachusetts the sum was recoverable against Sprague, they chose very unsuitable words to express their intention. And, indeed, a bargain of that sort would have been too unequal to have been entered into by a man of any intelligence, when he was voluntarily parting with property, and had the power of making his own terms respecting it. In order to justify the construction suggested by the counsel for the defendant, we must suppose that Sprague and Thompson deliberately intended to defraud the heirs of Gibson, if by the technical rules of law they should be able so to do. And furthermore, if by chance the heirs should recover a judgment against Sprague, and he should be obliged to pay the money, that Thompson might defend against his covenant upon the same technical rules which in such a case would have failed to protect Sprague. So that in such case Sprague was to lose, and Thompson to gain, the amount of the sum at least equitably due to the heirs of Gibson. Honest and intelligent men, as these parties undoubtedly were, are not to be supposed to have made such a contract, unless the terms in which it is expressed force the mind to such a conclusion. But we think it very clear, that the words of the covenant do not admit of such a construction. It is a simple covenant of indemnity, expressed in apt words, and binds the defendant to repay whatever shall be recovered by legal process anywhere, to the extent to which he stipulated. It must be proved, however, that the money thus recovered against Sprague was on account of money he received on Swett's bond.

And this is proved, if the evidence in the case were competent to prove this fact. The objection is, that parol evidence was admitted to prove it, that is, the same evidence on which the judgment was recovered in New Hampshire. The 434
recovery there was probably on the count for money had and received, and it does not appear by the record, that that count was for money paid on the bond. How should this be proved, but by parol evidence? The defendant in that suit could not have obliged the plaintiffs to set forth in the declaration the particular subject of his suit, nor could he, in his plea,

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have made it more certain, for it would have been setting out his defence in a manner, which, in such an action, would have amounted to the general issue. He has furnished, in this suit, the only evidence which could be produced of the grounds of the action; and, indeed, the very evidence on which the judgment was obtained. Every fact which exists on record must be proved by record; but when the question is as to the real subject matter of a suit, in order to show a bar to another suit, or to lay the foundation of an action of indemnity, the identity of the cause of action may be averred, and may be proved by other than record evidence.[1]

The contract limits the indemnity to 1500 dollars, and judgment must be rendered for that sum, with interest from the time of a demand made subsequently to the recovery in New Hampshire, if any such demand was made before the commencement of this action, otherwise from the date of the writ.

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[1] See *Standish* v. *Parker*, 2 Pick. (2nd ed.) 22, notes; *Wood* v. *Jackson*, 8 Wendell, 44; *Marten* v. *Thornton*, 4 Esp. R. 180; 1 Stark. Evid. (5th Amer ed.) 223.

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Reuben Baxter *et al. versus* Samuel Rodman.

The master and crew of a ship engaged on a whaling voyage, who are to receive, in lieu of wages, a proportion of the net proceeds of the oil which shall be obtained, are not partners with the owners of the ship, and need not be joined in an action brought by the owners to recover of a third person a part of such oil.

When a witness, being asked whether he is interested in the suit, declares that he has parted with his interest, and without further question is allowed to testify in chief, a new trial will not be granted because the deed of transfer or a release was not exhibited.

By a usage in the whaling business, masters of ships meeting at sea sometimes enter into a contract of *mateship;* so that if the ships cruise together, they divide equally the oil obtained, before they separate; if they cruise separately, they make an equal division upon their first meeting afterwards; if the ships accidentally separate and do not meet again, neither can claim of the other, if one returns home full; but if they do meet abroad, and neither has filled, the settlement and division take place immediately. *Held*, that this was a reasonable usage, and binding on the owners of the ships, where they do not prohibit the masters from making such contracts.

Although it is usual in mateships, for the masters to make the division of the oil when at sea, yet if one of them refuses to deliver what is due from him, an action will be sustained, after the return of the ships, between their respective owners.

Assumpsit to recover the value of thirty barrels of oil, alleged to be due to the plaintiffs by virtue of a contract entered into between one Clark, master of the ship Gideon, of Nantucket, belonging to the plaintiffs, and one Sprague, master of the ship Maria, of New Bedford, belonging to the defendant.

At the trial, before *Parker* C. J., it appeared, that the two vessels, being engaged in the whaling business, in the Pacific ocean, met in August 1823, and the masters entered into a contract, which is termed *mateship*. According to a usage which was proved, the effect of *mating* is, to establish a species of partnership in the business of taking whales and procuring oil; so that if the vessels cruise together, they divide equally the oil obtained by both, before they separate; or if they cruise separately, upon their first meeting afterwards they make an equal division, by the delivery of oil from the ship which has taken most to the ship which has taken least. If the vessels are then not full, they proceed again upon their business, either upon a new contract of mateship, or each 436
acting independently. If the vessels, after an agreement to

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mate, accidentally separate, and do not meet again until the voyage is finished, neither can claim of the other, if either returns filled with oil. But when they do meet abroad after such mateship, the settlement and division of oil take place immediately, unless one has filled.

Neither of the masters had instructions to enter into such a contract; but it was proved that a usage to mate vessels is common, and almost universal; that this usage is well known to merchants and owners of whale-ships in Nantucket and New Bedford, and that some vessels owned by the defendant had mated with others, which fact was known to him; and that the usage was of so long standing and so general, that the knowledge of all concerned in the whaling business would be presumed.

Upon the meeting of these two vessels after having mated, the defendant's ship had on board more oil than the plaintiffs', and an adjustment was made by the masters, by which it appeared, that according to the contract, 70 or 80 barrels of oil were due from the defendant's ship to the plaintiffs'. This quantity was delivered over, except thirty barrels, which the defendant's captain refused to deliver, on the ground that a whale, which it was supposed would yield about 60 barrels, which had been struck by him and taken to the plaintiffs' ship, had been lost by the carelessness or want of skill of the captain and crew of that ship.

And that was one of the grounds of defence. There was evidence, that according to the custom, when vessels have been mated, if any whales, which have been killed, are lost by accident, the loss is to be borne mutually. The jury were instructed to find for the defendant, unless they were satisfied that the whale was lost solely from accident.

Another point in defence was, that by the usage, these joint enterprises are to be settled when the vessels meet abroad, so that each can afterwards pursue her business, and complete her voyage by herself; and that it was neither according to the usage, nor conformable to justice, that the owner of
437 a vessel should be required to surrender part of her earnings, after, as it may be, he has settled with the crew, and delivered each man his proportion of the net proceeds of the

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voyage, according to the custom of the trade, in lieu of wages.* The jury were instructed, that if the contract was fairly entered into at sea, and broken by the defendant's captain, without any fault on the other side, the right of action then accrued, and the owner would remain liable, notwithstanding the inconveniences he might suffer.

The defendant's ship came home full, so that but for the breach of contract abroad, the plaintiffs would have had no ground of action. Several cases were proved, of bargains having been adjusted by owners after their vessels returned; but there could not be said to be any custom as to what they should do in case of a disagreement between the captains.

The deposition of Clark was objected to on the ground of interest, the captain and all the crew being interested jointly with the owners in the proceeds of the voyage; but the objection was overruled, he having sworn that he had parted with all his interest.

The defendant objected to the action, also, on the ground that the captain and crew of the plaintiffs' ship were joint owners of the oil, and ought to have been joined as plaintiffs.

A verdict was returned for the plaintiffs, and the defendant moved for a new trial.

Prescott, for the defendant, insisted upon the objections, that the action should have been brought by all concerned in interest, and that Clark's testimony ought not to have been admitted; but he relied chiefly on the points, that the usage proved was vague and unreasonable, and that it did not extend to this case. One of the ships which were mated, may be larger and stronger and better equipped than the other, and yet, by the custom, the oil obtained is to be divided equally, without any regard to those circumstances, and the master of the best ship, without any instructions from his owners, may continue the partnership as long as he pleases. This is a dangerous power, and much greater than a master of a ship possesses by the common law. Usages are to be construed strictly. The one proved permits the masters to make a settle-

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* See *Barney et al.* v. *Coffin*, *ante*, 115.

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ment when at sea, and protects them in so doing against their owners; but it does not go so far as to render the owners answerable in any case whatever. Suppose that the indebted ship should come home first, must the owner wait for the arrival of the other before he settles with his captain and crew, or must he guess at the deduction to be made from their shares? On this point of usage he cited 1 Bl. Com. 77; Bac. Abr. *Customs, C*; *Haspurt* v. *Wills*, 1 Ventr. 71; *S. C.* 1 Mod. 47; *Steel* v. *Houghton*, 1 H. Bl. 51; *Todd* v. *Reid*, 4 Barn. & Ald. 210.

S. Hubbard and *C. G. Loring*, for the plaintiffs, cited to the point that the captain and seamen of the plaintiffs' ship ought not to have been joined in the action, *Wilkinson* v. *Frasier*, 4 Esp. R. 182; *Mair* v. *Glennie*, 4 Maule & Selw. 240; *Rice* v. *Austin*, 17 Mass. R. 197; *Dry* v. *Boswell*, 1 Campb. 329, and notes; *Hesketh* v. *Blanchard*, 4 East, 144; *Muzzy* v. *Whitney*, 10 Johns. R. 226; *Wilson* v. *Mower*, 5 Mass. R. 411; *Offly* v. *Ward*, 1 Lev. 235; *Pigott* v. *Thompson*, 3 Bos. & Pul. 149, and note; *Sanford* v. *Sanford*, 2 Day, 559, and note:—and to the point of usage, *Fennings* v. *Ld. Grenville*, 1 Taunt. 241.

April 3d. PARKER C. J. delivered the opinion of the Court. The first objection in this case is, that as by virtue of the contract on which the master and crew engage in the voyage, they are to receive their pay out of the proceeds of the oil, they are joint owners and *quasi* partners, and so ought all to have joined in the action.

If this were the law, it would be found to be exceedingly inconvenient, and would, no doubt, entirely break up the peculiar mode of conducting these voyages, which have been found to be so beneficial to those who carry them on, and to the country. That every seaman should be tenant in common with all the other seamen, the master and the owners of the vessel, in all the oil which may be taken on a whaling voyage,

139 so that no action could be brought respecting it without joining all, and none could be sued without the whole, giving every seaman a right to discontinue the action, or to release the claim, or to receive payment for the whole, would be a state of things not suspected by the wise and enterprising men

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who have carried on the whale fishery. But we think it is not the law. The owners of the vessel and projectors of the voyage are the owners of the product of the voyage. The true meaning of the shipping contract is, that the men shall be paid out of the proceeds in a stipulated proportion. It is an agreement as to the mode of compensation, and gives them no property in the oil, but only regulates the amount of compensation. This we think is the true construction, and in this we are supported by the cases cited by the plaintiffs' counsel.[1]

The objection to the competency of the plaintiffs' captain to testify, is sufficiently answered by his declaration under oath, in reply to an interrogatory by the defendant, that he had parted with all his interest and received a compensation therefor. If the defendant had desired to ascertain whether this was a binding transfer, he should have pursued his questions, so as to have brought the form of the transfer before the Court. It is not unusual for members of corporations to sell out their interest in order to testify; and this fact is thought to be sufficiently proved by their declaration on the stand; unless, upon further examination, it should appear that the transfer was merely pretended, or was not valid.

As to the custom of the trade under which the defendant's captain made the contract, for the breach of which the action is brought, it appears to be of long standing, almost universal, and specially known to the defendant. If it be a lawful custom, he, as owner, is bound, because, with general instructions, a captain is presumed to have authority to conduct his voyage in reference to it; he is certainly at liberty, if he is not bound, to act in conformity to it, and whatever he does pursuant to it, is done by him as agent and by authority. It is then the owner's contract, and he is answerable if it be broken.

The custom must no doubt be lawful and reasonable; i. 440
is lawful, if reasonable and useful. Perhaps there can be no better evidence of the reasonableness of a custom, than its antiquity and uninterrupted prevalence. This is a custom coeval with the trade in which it is used, and although every

[1] See Abbott on Shipping, (4th Amer. ed.) 432, n. (1); *Grozier* v. *Atwood*, 4 Pick. 234.

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owner of a vessel may, by special instructions, prohibit his captain from conforming to it, no instance was shown at the trial, of any such prohibition.

The custom arose, probably, when the trade was pursued on a small scale, with smaller vessels and less numerous crews than are usual now; but it seems to have kept its ground, notwithstanding the changes in these particulars. Every captain going upon such a voyage has a right to presume that his employers will justify, if they do not expect that he will make, contracts of this nature, which time has so long sanctioned.

The custom being then indisputably proved, and it being in no respect unlawful, the contract made under it having been unjustifiably broken by the defendant's agent, he is responsible for the damages, unless the principal ground of defence is maintained, viz. that it is an essential part of the custom, that these bargains should be brought to a close in the seas where they are made, and that if broken there, no remedy exists for the suffering party. But so unreasonable a custom as this has not been proved; if it had been proved as a branch of the custom upon which we have been remarking, it might render the whole void for its unreasonableness.

It would amount to this, that a bargain made between two captains for the mutual benefit of all concerned in the two vessels, might be faithfully performed by one, and if grossly violated by the other, he should have no redress, unless he sought it by force in distant seas, where no law or government existed to aid him; and the consequence might be, that a captain, after having received from his partner a contribution according to the custom, and afterwards becoming indebted, might return home with a portion of oil which ought in justice to have been delivered to his partner. It is true,
441 that there was no proof of a custom to settle controversies after the vessels returned, but this is because controversies have rarely arisen. In the only instances in which the bargains made pursuant to the custom appear to have been broken, relief has been sought and obtained at home.

But there is no need of a custom to give a remedy under these circumstances. If the contract has been lawfully made and improperly broken, the right of action is immediately

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vested, and the law gives a remedy without the aid of custom. Without doubt, it may be often inconvenient, and sometimes injurious, to have the settlement of a voyage delayed until both vessels shall have returned, and their joint concerns have been adjusted; but this should be avoided by prohibiting the master from making such contracts.

Besides, if the master acts faithfully towards his owners, he will inform them under what circumstances he left the seas, and give them opportunity to retain enough of the proceeds to answer the demands which may be made upon them; if he neglects to do this, he may be answerable to them for any loss they may sustain.

It is said, that as part of the custom proved, is, that if either vessel shall return full, no contribution shall take place, and as the defendant's vessel did return full, the *casus fœderis* has not happened. But it is only when vessels separate accidentally, after making such a bargain, that this qualification applies. It would be absurd to say, that either party might defeat the right of the other by voluntarily refusing to perform the contract and withdrawing, after the right of the other has become fixed.

Judgment according to the verdict.

EBENEZER CHADWICK *versus* SAMUEL UPTON and Trustees. 443

An original writ prosecuted by an individual was indorsed thus — "A. B. by C. D. his attorney." — *Held*, that the attorney had thereby made himself responsible for the costs which the defendant should recover, and consequently had disqualified himself to be a witness on the part of the plaintiff.

ASSUMPSIT. On the trial, Mr. Peabody being offered as a witness on the part of the plaintiff, the defendant objected to his competency, on the ground that he was the indorser of the writ, and so responsible for the costs in case the defendant should prevail. The writ was indorsed, "*Ebenezer Chadwick, by A. Peabody his Att'y.*" The judge overruled

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the objection, and admitted the witness; and a verdict being found for the plaintiff, the defendant moved for a new trial.

Blair and *Bliss*, in support of the motion, cited *St.* 1784, *c.* 28, § 11; *Middlesex Turnp. Corp.* v. *Tufts*, 8 Mass. R. 266; *Gilbert* v. *Nantucket Bank*, 5 Mass. R. 97; *Caldwell* v. *Lovett*, 13 Mass. R. 422; *Ely* v. *Forward*, 7 Mass. R. 27. In this last case it is said, "every original writ must be indorsed, either by the plaintiff or his attorney." This writ was not, in fact, indorsed by the plaintiff; it must therefore be considered as indorsed by his attorney.

Peabody, for the plaintiff. Where the attorney indorses the writ himself, the defendant has a cumulative remedy, the attorney, as well as the plaintiff, being responsible for costs. But the statute does not intend, that where he puts his name on the writ, as in this instance, evidently meaning to bind the plaintiff alone, he shall be liable himself, when in signing a promissory note in a similar manner he would not be responsible. It may be objected, that the attorney might thus indorse the writ when the plaintiff is out of the State; but the answer is, that then, according to the statute, the indorsement would be insufficient. In *Middlesex Turnp. Corp.* v. *Tufts*, the plaintiffs being a corporation, the statute could not be complied with except by an indorsement by an agent. Suppose
443 that the attorney, by the plaintiff's direction, had written the plaintiff's name alone on the back of the writ, would not that have been the plaintiff's indorsement?

PARKER C. J. said, in substance, that the Court were of opinion that Mr. Peabody must be considered as the indorser, and so not a competent witness. The statute says, that the plaintiff's agent or attorney, who shall indorse his name upon an original writ, shall be liable in case of the avoidance or inability of the plaintiff to pay the defendant such costs as he shall recover;[1] and as agent or attorney, we think Mr. Peabody would be liable.[2] It would be an induce-

[1] See the provisions made concerning the indorsement of writs, in Revised Stat. *c.* 90, § 10 to 13.

[2] See *Davis* v. *M'Arthur*, 3 Greenl. 27; *How* v. *Codman*, 4 Greenl. 79; *Harmon* v. *Watson*, 8 Greenl. 286.

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ment to commence actions, if when the plaintiff was out of the commonwealth, the attorney might put the plaintiff's name on the writ, and be free himself from responsibility for costs. An ingenious argument might be made on either side, but we think convenience preponderates in favor of holding the attorney liable; although, for the sake of justice, this might likewise be considered as the indorsement of the plaintiff. Chadwick v. Upton & Tr

New trial granted.

James Swan, Appellant &c., *versus* Antoine F. Picquet.

A mere debtor to the estate of a person deceased, is not interested in, and cannot appeal from, a decree of a judge of probate granting letters of administration on such estate.

The judge of probate of this county having decreed, that letters of administration on the estate of Jean C. Picquet should be granted to his son Antoine F. Picquet, an appeal was entered by James Swan, who alleged as reasons for the appeal, that it appeared that the deceased was a French subject domiciled in Paris, and that he died there, not having left any estate within this commonwealth; that no more was pretended, than that at the time of his decease he was possessed of certain bills of exchange, which had since been brought into this State, Swan, the acceptor, being at the time of making them, and ever since, resident in France, and within the same jurisdiction within which Picquet the elder died; that there was no proof that the supposed debtor had any property within this State; and that the acceptance of the bills was obtained by fraud and duress, and Swan, in truth, was not a debtor to Picquet the elder at the time of his decease. 444

Antoine F. Picquet now moved that the appeal should be dismissed, on the ground that the appellant had no interest in the matter thereof, which could be recognised by the Court, and was not by law entitled to maintain the appeal.

J. T. Austin, and *J. B. Davis*, in support of the motion. This appeal is claimed under *St.* 1817, c 190, § 7, [see *March 30th*

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Revised Stat. c. 70, § 36,] which gives a right of appeal to "any person aggrieved" at any decree of a judge of probate. If Swan, as he says, was not a debtor to the estate of the deceased, he certainly was not aggrieved. But supposing him to be a debtor, still it would be inconvenient, and contrary to the intention of the legislature, that every debtor should be allowed to appeal from the appointment of an administrator. The rights of an heir, legatee, or creditor, may be injuriously affected by the appointment of an unfit person; but not so the rights of a debtor. *Penniman* v. *French*, 2 Mass. R. 140 *Downing* v. *Porter*, 9 Mass. R. 386.

Prescott and *W. Sullivan*, *contrà*. Swan is the only person interested in the estate, if any, to be here administered upon, and he is the only person aggrieved at the decree. The appellee might commence a suit in France, and if he should recover a judgment, he might then bring an action here in his own name upon the judgment. Instead of doing this, he wishes to change the forum, in order to oppress the appellant, who, being in a foreign country, must defend a suit here under a disadvantage.

April 5th. PARKER C. J. The Court are of opinion, that, under the statute, a party aggrieved must be one who is interested in the administration of the estate, and not a debtor merely. If one debtor has a right to appeal, every debtor must have

445 the same right; which would be inconvenient. Whether these letters of administration were properly granted or not, we do not decide.

Appeal dismissed

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Le Barron Putnam *versus* Joseph Hall, Sheriff &c.

The rights of a subsequently attaching creditor will not be affected by the amendment of a mistake in the first attaching creditor's writ, though appearing manifestly, on the face of the writ, to have been occasioned by a mere slip of the pen.

Case for an alleged default in not levying an execution in favor of the plaintiff upon certain personal property of one Brewer, his debtor, which had been attached on his original writ. The property had been previously attached on a writ sued out by one Dickerman, in which, by a slip of the pen, the command to the officer was to attach to the value of *six* dollars only, the cause of action set forth, and the judgment afterwards recovered, being for more than *four hundred*. The writ was amended in the Court of Common Pleas, with the consent of Brewer, by inserting the word *hundred* after the word *six*. *April 5th*

It was *held*, that the plaintiff was not affected by the amendment, and that he might maintain this action against the officer for applying the property in full satisfaction of Dickerman's execution, there not being a surplus sufficient to satisfy the execution sued out by the plaintiff.

B. Sumner, for the defendant, cited *Nichols* v. *Thomas*, 4 Mass. R. 232 ; *Albee* v. *Ward*, 8 Mass. R. 86 ; *Sanford* v. *Nichols*, 13 Mass. R. 288 ; *Bayley* v. *Bates*, 8 Johns. R. 143 ; *Mac George* v. *Birch*, 4 Taunt. 584 ; *King* v. *Bridges*, 7 Taunt. 294.

H. Fuller and *Morey*, *contrà*, relied on *Bean* v. *Parker*, 17 Mass. R. 591 ; *Danielson* v. *Andrews*, 1 Pick. 156 ; *Hill* v. *Hunnewell*, ibid. 192 ; *Willis* v. *Crooker*, ibid. 204, [see 2nd ed. 206, n. 1 ;] *Brigham* v. *Este*, 2 Pick. 423, [see 2nd ed. 425, note ;] *Denny* v. *Ward*, 3 Pick. 199, [see 2nd ed. 201, note ; *Vancleef* v. *Therasson*, *ante*, 14, note.]

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ABRAHAM BABCOCK, Administrator, *versus* BENJAMIN THOMPSON.

A bill of particulars should give as much information as a special declaration, so that the defendant may know the real ground of the action.

It is amendable like a declaration.

If it is insufficient, or not attempted to be supported by proper evidence, a nonsuit may be ordered.

All gaming is unlawful; and money lost at gaming, whether by fair or by foul play, cannot be recovered back by the loser, nor by his executor or administrator, in an action commenced after three months from the losing.

ASSUMPSIT for money had and received. The following bill of particulars was filed.

"The plaintiff, as administrator &c. of Warner Claflen, &c., claims to recover of Thompson the following sums of money and credits received and had of said Warner Claflen in December A. D. 1820, to wit:—

One $1,000 bankbill, bank not recollected . . .	1,000
Two $500 bills of Union Bank	1,000
Two checks upon Boston banks amounting to . .	250
Bankbills current in this commonwealth amounting to	500

The above is all the specification, and as particular as can be given by me. A. Moore, attorney for Babcock."

The plaintiff offered evidence of money fraudulently won in gaming with cards; which was ruled by the judge, who sat on the trial, to be inadmissible, and a nonsuit was entered.

April 4th. *S. D. Parker* now contended that the nonsuit ought to be taken off.

An action for money had and received lies to recover back money unfairly won by gaming. Com. Dig. *Action upon the Case for a Deceipt, A*, 1; 2 Com. on Contr. 123.

No objection was made to the particular until the time of the trial, although the defendant, in fact, knew the ground of the action several months before. The strictness of the English law in respect to a particular, has never been adopted here; but even in England the strictness of special pleading
447 is not applied to a statement of this sort. It is only an amplification of the declaration. *Ryckman* v. *Haight*, 15 Johns. R. 222. Here the sums of money were specified, with the time when, and the person of whom they were received

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The defendant should at least have been called on for an affidavit that he was surprised. *Day* v. *Bower*, 1 Campb. 69, note ; *Davies* v. *Edwards*, 3 Maule & Selw. 380 ; *Millwood* v. *Walter*, 2 Taunt. 224 ; *Brown* v. *Hodgson*, 4 Taunt. 189. If the particular was insufficient, the plaintiff should not have been driven out of court, but should have had leave to amend. 1 Tidd's Pract. 536 ; 2 Taunt. 224.

Rand and *Fletcher*, *contrà*. The practice of filing a particular where the counts are general, is recent in England, and in this State we have no reported case on the subject. *Le Breton* v. *Braham*, 3 Burr. 1390 ; Impey's Pract. in K. B. 226 ; 1 Dunlap's Pract. 402 *et seq*. The plaintiff can neither contradict nor give evidence out of his particular ; it becomes part of his declaration. *Holland* v. *Hopkins*, 3 Esp. R. 168 ; *S. C.* 2 Bos. & Pul. 243 ; *Wade* v. *Beasley*, 4 Esp. R. 7. Whether the defendant had been told informally that the action was brought for money fraudulently obtained at gaming, was immaterial ; if that was the gist of the action, it should have appeared on the record. *Brown* v. *Watts*, 1 Taunt. 355 ; *Collett* v. *Thompson*, 3 Bos. & Pul. 246 ; *Doe* v. *Phillips*, 6 T. R. 597 ; *Squire* v. *Tod*, 1 Campb. 293. Our objection was, not that this bill of particulars was insufficient in itself, but rather that the plaintiff wanted to support it by improper evidence. *Hurst* v. *Watkis*, 1 Campb. 68. Ordering the nonsuit was right in principle, the evidence not applying to the declaration, and was according to the practice in England in such cases.

But suppose the action to be properly brought, in point of form, to recover back money lost at gaming, still the nonsuit must stand. The general principle is, that where the plaintiff cannot maintain his action without showing an illegal act on his own part, the defendant must prevail. *Simpson* v. *Bloss*, 7 Taunt. 246 ; *Stokes* v. *Twitchen*, 8 Taunt. 492 ; *Booth* v. *Hodgson*, 6 T. R. 405 ; *Howson* v. *Hancock*, 8 T. R. 575 ; *Worcester* v. *Eaton*, 11 Mass. R. 376. That all gaming for money is unlawful in this commonwealth, cannot be questioned; *St.* 1785, *c.* 58, § 2 ; *St.* 1798, *c.* 20 ; Anc. Charters &c. 118, 119 ; the statute of 1785, however, makes an exception to the general principle above mentioned, and allows the party

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who has lost money at gaming to recover it back, provided he brings his action within three months. No action was commenced, in the present instance, until more than two years had elapsed after the money is supposed to have been lost, and the money, therefore, can never be recovered back. 1 Dane's Abr. 697, § 13; *Brandon* v. *Pate*, 2 H. Bl. 308. This last case shows that an executor or administrator cannot maintain an action for money so lost. Even if the loser might recover it back at common law, his right is devested by the statute after three months. The citation from Com. Dig. has reference to a statute making a distinction between money won fairly and money won by foul play. We have no such distinction, and it would be derogatory to the Court to determine between two gamblers, whether money was lost by fair play or by foul. *Brown* v. *Leeson*, 2 H. Bl. 43; *Amory* v. *Gilman*, 2 Mass. R. 1.

Parker, in reply, said that the plaintiff relied on the common law, and he admitted that if there was no difference in law between money won fairly and money won by fraud, the plaintiff had no case.

April 5th. PARKER C. J. delivered the opinion of the Court, to the following effect. The ground of this action was money lost at gaming, and by foul play. It was objected at the trial, that the plaintiff's particular could not lead the defendant to think this to be the ground, and the judge supposed the plaintiff was going to amend. That, however, was not done, and the question now is, whether the particular was sufficient, and whether the nonsuit was rightly ordered.

We consider the objection to be well founded. A particular should give as much information as a special declaration, though without the form.[1] Telling the defendant that the action was for bankbills, gave him no information that would aid him
449 in making his defence. This mode of proceeding is of recent origin here, and it seems to be so in England. It was found to be necessary, in consequence of the remedy by action for money had and received being made so common. There is no reason why the same rules should not be applied to it

[1] See Howe's Pract. 413 to 415

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here as in England; and if it is insufficient, it must be attended with the same consequences. Undoubtedly it should be amendable, like a declaration.

The question then is, whether the nonsuit was proper. A nonsuit should not be ordered without giving the party an opportunity to rectify a mistake. An insufficient declaration will be a ground of nonsuit, unless the plaintiff moves to amend and obtains leave. So in regard to a bill of particulars. In the present case, as there was a mistake, the plaintiff thinking his particular sufficient, we might yet allow him to amend on more strict terms, if it would be of any avail.

But the Court are of opinion that the action cannot be maintained. We have no doubt, that according to the general policy and laws of this commonwealth, all gaming is unlawful;[1] and the plaintiff cannot maintain his action, where he is obliged to show his illegal act as the foundation for a recovery. This was pretty fully considered and settled in *Worcester* v. *Eaton*, and we see no reason now to change the opinion there expressed. Where a party acts illegally, he is to suffer the loss of his money as the consequence, if the money is sought to be recovered, except where he may have a remedy under the particular provisions of some statute. Here is a case of gaming accompanied with cheating. Clearly if the gaming had been fair, the law would give no remedy. The only question then is, whether the fraud will alter the case. We think it will not. If a man thus voluntarily puts himself in a condition to be cheated, through his illegal act he cheats the government, and the other person cheats him, and they must be left to settle the affair between themselves.

It was intimated that an executor might recover, though the testator himself could not; but we see no authority for the distinction; and it would be an encouragement to gaming, if a man might kill himself, and thereby give his executor a remedy. That the assignees of a bankrupt may recover money lost at play, results from the statutes of bankruptcy; and in the case of *Brandon* v. *Pate*, where that point was decided, it is said that an executor could not bring the action.

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[1] See Revised Stat. c. 50, § 12 to 19.

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On general principles, and by the policy of the law, the representative is not to recover back the penalty which the loser may be said to have paid for his transgression.

Motion overruled.

James Hall *et ux.*, Appellants &c., *versus* Joshua Davis *et al.*

A testator, after devising one fifth part of his estate to each of his children, directed that all he had advanced to them respectively, and for which he had claims and demands, should be considered as a part of his estate and as a part of the devises. These claims against the different children were unequal in amount, and consisted of promissory notes on interest and book charges. It was *held*, that the sum for which any note was given, should be considered as an advancement, not bearing interest, and that the promisor should not be allowed to pay it as a debt in order to entitle himself to a fifth part of the testator's real estate.

This was an appeal from a decree of the judge of probate on the petition of the appellants for a partition of the real estate of Amasa Davis, late deceased.

Davis left five children, the wife of James Hall being one of them. By his last will he gives to each child one fifth of the residue of his estate, real, personal, and mixed, after the payment of his debts and specific legacies, and then directs as follows: — "And it is further my will, that each of my children &c. shall be charged with all the claims and demands which I now have, or at the time of my decease shall have, against them respectively, and that the several devises, legacies and bequests herein made, shall respectively be diminished by deducting my said claims and demands from them respectively,
451 so that all that I have advanced for them respectively, and for which I have claims and demands, shall be considered as a part of my estate, and as a part of the legacies and devises herein provided."

The respondents, who were the executors, paid all the debts and specific legacies out of the personal estate.

In the testator's books were sundry charges against some of the children, and among his papers were certain promissory

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Hall v. Davis.

otes made by his son and sons-in-law, purporting to be on interest. One of these notes was made by Hall, in 1814, for 5000 dollars.

Before presenting this petition, Hall offered to pay to the executors the face of his note, but refused to pay the interest, alleging that it was given for sums furnished as advances; that it was intended by the testator, that interest should be charged, either against none, or against all of his children, so that an equal division should be made of the estate, whether the claims should be considered as debts or as advances; and that if interest was raised on the other claims, then he was willing to pay his note with interest. And whatever might be the decision in regard to interest, the appellants claimed the right of paying the note in money, and thus entitling themselves to one fifth of the real estate.

The executors resisted the partition, partly on the ground, that when it should be made, the petitioners would not be entitled to one fifth of the real estate; but that the amount of all the advances to the children should be added to the value of the estate unadministered, and that this aggregate should be divided equally among the five children, each one to be charged with his notes and interest thereon, and with the book charges against him, and to receive the balance of his share in the real or other estate.

S. Hubbard, for the appellants, referred to *Quarles* v. *Quarles*, 4 Mass. R. 680; *Bemis* v. *Stearns*, 16 Mass. R. 203. April 4th.

Peabody, for the respondents, cited *Osgood* v. *Breed*, 17 Mass. R. 359.

Per Curiam. No doubt the testator might have considered the notes and the book charges as debts; but in the general distribution of his estate he chose to consider them both as advancements. He saw that if he should treat them as debts, the notes would carry interest, while the book charges would not, and he intended to guard against that result. Hall has no right to pay his note and come in for a fifth of the real estate, because the sum for which it was given is not a debt, but an advancement and no interest is to be allowed upon it. April 5th. 452

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On this view we are satisfied that the partition should be decreed, reference being had to the advancements.

Decree reversed and proceedings remitted.

JOHN KNAPP, Administrator &c., *versus* WILLIAM R. LEE.

Whether in an action upon a negotiable promissory note, given for the purchase money of land conveyed by deed with the usual covenants of seisin and warranty, the action being between the original parties, it is competent for the defendant to set up, by way of defence, a total want of title in the grantor at the time of the conveyance, and an eviction of the grantee, *quære.*

But where the promisee had died insolvent, and the action was brought by the administrator of an indorsee, who at the time of the indorsement had notice that the title was questioned, such defence was allowed under the general issue, since the defendant could not plead the demand on the covenants by way of set-off, nor avail himself of it in a cross action; and in such a case the plaintiff may introduce evidence to show that the value of the land, at the time of the eviction, was less than the amount of the note.

A knowledge on the part of such indorsee, that the title to the land is questioned, and that the grantee intends to resist payment of the note in case he shall be evicted, without a knowledge of any particular fact tending to invalidate the title, is sufficient notice to put him on his guard, and to let the grantee in to make such defence.

THIS was *assumpsit* by the plaintiff, as administrator *de bonis non, cum testamento annexo*, of Samuel Dilloway, against the defendant, as maker of a promissory note, dated the 19th of November, 1818, for 1000 dollars and interest, payable in three years to William S. Skinner or order, and by him indorsed to Dilloway.

The defence rested on the ground, that the note in question was one of several notes given by Lee to Skinner as part 453
of the consideration for certain land, which was conveyed by Skinner to Lee by deed, with the usual covenants of seisin and warranty; that since the conveyance, Lee's title had been defeated by a judgment recovered by John Somes, prosecuting by his guardian, on the ground that the land was obtained by Skinner from Somes by fraud, of which Lee was so far conusant, as to affect the conveyance from Skinner to him; that at or before the indorsement of the note in question to Dilloway, he had notice that Lee's title was contested by

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Somes's guardian, and that Lee expected to hold the land against such claim, but that if he should fail so to do, it was his intention not to pay the notes.

It appeared that the note in question was one of seven notes, for 1000 dollars each, given for the land; that 2000 dollars more, making the whole consideration, were paid in cash or some other way; that Lee entered under the deed from Skinner, and was in the occupation of the land till within a short time before the trial of this action, when he was evicted by force of a writ of possession issued upon the judgment before mentioned; and that Skinner had died insolvent.

It was also in evidence, that Dilloway stated to a witness, that he was about taking some of the notes and advancing some money, and that he inquired whether Lee would probably pay them when due; that the witness informed him, that Lee would probably pay them if he held the land, otherwise not; and that Dilloway, at that time, expressed his own opinion that Lee's title was valid.

Wilde J. directed the jury to confine their attention to the question of notice to Dilloway, all other questions being questions of law intended to be reserved; and as to such notice, he instructed them, that it was not material whether Dilloway had notice of the particular facts tending to invalidate Lee's title, or that in his own opinion the title was good; if he knew that the validity of it was questioned, and that in the event of its being adjudged bad, it was the defendant's intention to resist payment of the notes, this was sufficient to put him on his guard, and when the title was so adjudged bad, it afforded a good defence.

A verdict was found for the defendant, which was to be 454
set aside and a verdict entered for the plaintiff for the amount of the note declared on, and interest, should the Court be of opinion that the above direction was wrong in point of law.

Another action between the same parties upon another of the notes, and which it was conceded by the plaintiff's counsel, in the argument, stood on the same ground as if it had been brought by Skinner, was by consent submitted to the same jury, and a verdict was found for the defendant, subject to the opinion of the whole Court.

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Knapp v. Lee. March 9th.

L. Shaw, for the plaintiff, said it had been decided by this Court, both before and since the period of our Reports, that in an action upon a promissory note, given as the consideration for a deed of land containing covenants of seisin and warranty, a failure of title is no defence, but the grantee's remedy is upon the covenants. This law is founded upon several reasons. There must be a total failure of consideration for the note, otherwise the holder would recover part of the sum for which it was given; but it would be difficult to make an apportionment, as there is no necessary measure between damages for an eviction and the consideration of the note. A defence in these actions would not be a bar to an action on the covenants. It could not be maintained, that it should go in mitigation of damages, as there would be nothing on the record to show that a recovery on the notes failed in consequence of the eviction. Further, there may be several notes given as the consideration for the land, as was the case here, and the notes, being negotiable, may go into different hands. The covenants too run with the land, and the right of suing on them is transferable in effect. Had the transaction between Skinner and Lee been by indenture, and it had been stipulated that the money should be paid at a certain time, the covenants would have been independent. In the case of *Lloyd* v. *Jewell*, 1 Greenl. 356, there is a direct argument of the Court on this question, in which *Mellen* C. J. reviews the cases in our reports, and concludes, that a total or partial
* 55 failure of title is no defence to an action like the present. The same point was decided by this Court in *Little* v. *Roberts*, 1 Dane's Abr. 125. See also *Fowler* v. *Shearer*, 7 Mass. R. 22; *Smith* v. *Sinclair*, 15 Mass. R. 171. In *Greenleaf* v. *Cook*, 2 Wheat. 13, it was held, that the failure of consideration must be total. That some title, however, passed to Lee, is manifest from the case of *Somes* v. *Brewer*, 2 Pick. 184. The case of *Frisbee* v. *Hoffnagle*, 11 Johns. R. 50, in which a failure of title was held to be a good defence, was decided without argument, and the point of the defendant's having a remedy on the covenants was not suggested.

As to notice, Dilloway merely knew that Somes intended to contest Lee's title, and that Lee, if evicted, intended to

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re st payment of the notes. It does not appear that Dilloway had notice of a single circumstance that would avoid the title.

S. Hubbard and *Harrington*, *contrà*, on the point of notice, cited *Smith* v. *Low*, 1 Atk. 489. They insisted that there was a total failure of consideration for the notes, and that this was a good defence under the general issue. 1 Com. Contr. 12; *Shearer* v. *Fowler*, 7 Mass. R. 32; *Bliss* v. *Negus*, 8 Mass. R. 46; *Taft* v. *Montague*, 14 Mass. R. 282; *Greenleaf* v. *Cook*, 2 Wheat. 13; *Howard* v. *Witham*, 2 Greenl. 390; *Frisbee* v. *Hoffnagle*, 11 Johns. R. 50; *Winter* v. *Livingston*, 13 Johns. R. 54. Lee's entry was no evidence of title; Daniel's Exch. Rep. 81, note; he was liable to be evicted and to be sued in trespass for the mesne profits, so that nothing passed to him. Skinner had no title in himself, and though he might pass a title to an innocent purchaser, he could not to Lee, who had notice of the fraud practised on Somes. If Lee is considered as a party to the fraud, he has no remedy on the covenants, and in an action on the notes he may avail himself of the maxim, *in pari delicto potior*, &c. *Worcester* v. *Eaton*, 11 Mass. R. 376; *Collins* v. *Blantern*, 2 Wils. 347. But if he only knew of the fraud, without being a party to it, he made an ineffectual purchase under a mistake of the law, and he may resist payment of the purchase money. No one can be injured by a judgment for the defendant; — not the representatives of Dilloway, for he had notice of the fraud; not those of Skinner, for if living, he would have to repay to Lee the money recovered in this action; — but on the other hand, if Lee pays the money, he will be without a remedy, in consequence of Skinner's dying insolvent. If the action were in the name of Skinner, the defendant might plead the breach of the covenants by way of set-off, instead of filing the deed before the commissioners of insolvency on Skinner's estate; but it being brought by the administrator of Dilloway, that course could not be taken. Either the verdict ought to stand, or the defendant should be permitted to plead specially all the circumstances in the case.

Shaw, in reply, said an estate did pass from Somes to

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Skinner, which was good against third persons, and defeasible by Somes alone. Payment of the notes could not have been resisted originally, for it did not then appear that the defendant ever would be evicted. The covenants of Skinner were a sufficient consideration, and would give a better remedy to the defendant, as he would then recover the proper amount of damages. The insolvency of Skinner is immaterial; for if a party takes a covenant, he knows with whom he deals, and he is estoppeu to object the covenantor's insolvency.

July 21st.

PARKER C. J. This action is brought to recover the amount of a promissory note, made by the defendant to William S. Skinner, and by Skinner indorsed to the plaintiff's testator. It appears by the report of the case, that this note, with others, was given as security for the consideration of certain real estate, which Skinner had granted and conveyed to the defendant by a deed containing the usual covenants of seisin and warranty; that the defendant has been evicted of this estate on a suit brought by the guardian of John Somes, who had granted and conveyed the estate to Skinner, but under circumstances of fraud and practice on the part of Skinner, which in judgment of law rendered this deed void against Skinner, and also against the defendant, he having been sufficiently conusant of those circumstances to have his title impeached thereby, though not actually a party to the fraud.

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These facts present the general question, whether they constitute a good defence against this action upon the note; and the further question is raised, whether, if the defence were good between the original parties to the note, it can be set up against the plaintiff who is an indorsee for a valuable consideration.

The latter question is disposed of by the verdict of the jury, which finds, that at the time of the indorsement of the note, the plaintiff knew that the defendant intended to resist payment, in case his title to the estate purchased should ultimately fail. This knowledge puts the plaintiff on the same footing with Skinner, in any controversy about the notes, so that the single question remains, whether the failure of title is such a failure of consideration for the note as will constitute a defence.

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The general proposition, that a total failure of the consideration of a note, or other written promise, may be given in evidence in an action upon such note or promise, and if made out, will defeat the action, is too well maintained by authorities to admit of question.

In the recent valuable edition by *Phillips* and *Sewall*, of this bar, of Mr. Justice *Bayley's* treatise on bills and notes, *p.* 340, [see Phil. and Sewall's 2nd ed. 531,] it is laid down in the text, that a total failure of consideration, *where it can be insisted on*, that is, where the parties are proper for such a defence, is a total bar, and inadequacy or partial failure is a bar *pro tanto* only. Many cases cited in the notes, which are indeed epitomized, fully sustain this proposition. It would be idle to repeat the citations here, as that book, in its new form, will be in the hands of all the profession in this commonwealth at least.

The question then comes to this, whether the facts reported show a total failure of consideration in the case before us; and since the land for which the notes were given has been taken from the defendant by judgment of law for want of title in Skinner his grantor, there is a total failure, unless the entry and possession and taking the profits under the deed by the defendant create a consideration, or unless the covenants in the deed, which give him a right of action for damages, answer 458
that purpose. With respect to the possession and profits, they cannot constitute a consideration, because they have been received to the use of the party who has recovered the possession by paramount title, and he has his action of trespass for those profits. There is nothing then but the single point, whether the covenants in the deed form a consideration which will prevent the defendant from avoiding the action upon the notes, by showing an eviction from the land for which the notes were given. On this question opposite decisions have been made by two courts entitled to our highest respect for their judicial character.

In New York, in the case of *Frisbee* v. *Hoffnagle*, 11 Johns. R. 50, it was decided, that notwithstanding the covenants in the deed, a want of title in the grantor, even without an eviction of the grantee, was a lawful defence against an action upon

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notes given for the purchase money, there being a *total failure* of consideration, and a circuity of action being unnecessary.

In Maine, in the case of *Lloyd* v. *Jewell*, 1 Greenl. 352, the case before the court was one of only partial failure of consideration, one sixth part of the land sold belonging to some person other than the grantor, and the object of the defence being to avoid one of six notes given for the consideration, by showing that defect of title. The court, however, laid down propositions and principles broader than the case required, the chief justice distinctly stating, that in an action on a note given for the price of land conveyed by the promisee to the promisor by deed containing the usual covenants of seisin and warranty, the action being between the original parties, a total or partial failure of title, or want of title in the grantor at the time of the conveyance, is no defence; and he adds, that "for a long series of years the practice in Massachusetts has proceeded upon the principle, that the covenants in the deed of conveyance, or, if no deed had been given, but only a bond or covenant to give a deed, then such bond or covenant constituted a good and valuable consideration for the note, and of course a want or failure of title would be no legal defence to an action on such note."

459 It does not appear that this question has been directly decided by this Court, though there are dicta or intimations in several cases which favor the opinion above stated; but we do not recollect any such fixed and settled practice as is stated by the learned chief justice of Maine. It is very possible that a prevalent opinion to that effect has existed, and that counsel have generally acted upon it, in advice to their clients, and thus the practice alluded to may have established itself. The cases cited and commented upon by the chief justice have a bearing towards his opinion, though they certainly cannot be said to establish the doctrine advanced by him; and *Sedgwick* J., in giving the opinion of the Court in the case of *Bliss* v. *Negus*, 8 Mass. R. 46, intimates a pretty strong opinion in favor of a defence of this nature. Still, however, we do not think the question decided, and some of the reasons given by *Mellen* C. J. against allowing such a defence are undoubtedly strong

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particularly that the damages to be recovered on the covenants are uncertain, being more or less than the consideration money, according as the value of the land may be at the time of the eviction; so that to defeat the action for the consideration by such defence may sometimes produce injustice.

Another remedy too exists, which may be the reason why the principle has not been directly presented to the Court; that is, where the parties are living, the party who is sued for the consideration may immediately bring his action on the covenants, and the Court will see that they proceed *pari passu*, so that one judgment may be set off against the other, or, by statute, the executions may be thus treated, and thus perfect justice may be done between the parties.

This remedy however fails, where the covenantor dies insolvent, or at least is attended with inconvenience; and therefore some other means ought to exist, to prevent a party from being compelled to pay the whole of his debt to the estate of the insolvent for the benefit of his creditors, when he will obtain perhaps a trifling dividend upon a debt of equal magnitude due to him from the insolvent.

Without doubt the demand for damages on the covenants, 460
there having been an eviction, would in such case be sustained by the commissioners on the insolvent estate, and when such claim is presented, the administrator may set off against it the notes given for the consideration. If the claim should not be presented, and if the administrator should sue the notes, the defendant in the suit may plead this demand on the covenants in set-off, and judgment will be for either party as the balance shall appear. This mode of adjusting claims necessarily grows out of the statute providing for the settlement of the estates of persons dying insolvent, as was determined in the case of *M'Donald*, appellant from the decree of the judge of probate, v. *Webster*, 2 Mass. R. 498. [See Rand's edit. 500, n. (*a*).] Without this remedy great injustice would happen, for the administrator might refuse to produce the counter claim before the commissioners, and the consequence would be, that on a suit he would recover the whole sum due to the estate, whereas the other party could obtain only an equal proportion with the other creditors, of the insolvent's effects. A remedy

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must exist, where the action is brought by an assignee of an insolvent, who from knowledge of the facts is subject to the same defence as the assignor would be; otherwise, insolvent persons, or even their administrators after their decease, might defeat that just principle of the insolvent laws, which considers the balance, after adjusting the claims, as the only debt remaining.

We consider the defendant as entitled to avail himself of this principle, and the result will be, that if the value of the land at the time of the eviction is equal to the sum due on the notes, he will make a full defence; otherwise, judgment will be rendered against him for such balance as may be found due. Now in point of form, standing as this action does in the name of the administrator of the assignee of the note, the defendant cannot plead this matter in set-off; nor will a cross action upon the covenants avail him, because he could not set off a judgment or an execution against the administrator of Skinner, against the judgment or execution recovered by the
461 present plaintiff; but we think that for this cause he cannot be deprived of a substantial legal defence to the plaintiff's suit. The intestate, knowing that a meritorious defence existed, of which the defendant could avail himself, to all beneficial purposes, in the manner above suggested, provided Skinner or his administrator had brought the action, purchases the note; and the effect of this purchase is, to prevent the defendant from obtaining a complete remedy by cross action upon the covenants, or by a plea of set-off against Skinner's administrator. We think that this, in a legal point of view, is a fraudulent act, and that thereby the defendant, to prevent injustice, is necessarily let in to show, under the general issue, those facts, which under the forms above stated would completely protect him against the effect of a suit upon this note.

Without determining therefore the general question, whether, when other sufficient remedies exist, a mere failure of title, when there are covenants of seisin and warranty, will constitute a defence against an action for the consideration,[1] we are

[1] See Bayley on Bills, (Phil. & Sewall's 2nd ed.) 588 to 540, and notes 2 Stark. Evid. (5th Amer. ed.) 170, note (2); 2 Kent's Comm. 472

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all of opinion, that in the present case, there being no other remedy, it is consistent with every sound principle of justice and of law, to allow the defence which was offered. The plaintiff may meet this defence by showing that the title was good, or that the land, at the time of the eviction, was worth less than the consideration, and thereby entitle himself to recover the difference; but without evidence to this effect, he ought to be entirely barred of his action.

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The legislature have authority to enact, that the interest which an inhabitant of a city may have in a penalty for the breach of a by-law thereof, shall not disqualify him to act as a judge, juror, or witness, in a prosecution to recover such penalty.

The city of Boston have authority to make a by-law prohibiting persons having the care of a wagon, cart, &c., from driving their horses on a trot or gallop in the streets of the city, such by-law not being in restraint of trade, but a reasonable regulation of it.

Although the object of such by-law be to prevent passengers in the streets from being endangered by fast driving, yet in a prosecution on the by-law it is not necessary to prove that any individual was actually endangered thereby.

Upon an indictment for a breach of such by-law, evidence of the defendant's general character as a careful driver, is inadmissible.

So of evidence of permission from the mayor and aldermen of the city to drive faster than the by-law allows.

Whether a by-law be reasonable or not, is for the court to determine, and evidence to the jury on that question is inadmissible.

An act of the legislature, providing that in prosecutions on the by-laws of Boston it shall not be necessary to set forth the by-law at large in the complaint, is not unconstitutional as conferring an exclusive privilege.

So of *St.* 1817, *c.* 50, providing that such prosecutions may be in the name of the commonwealth: and that statute is not repealed by the act by which the town of Boston was incorporated as a city.

Whether a complaint for a breach of a by-law of Boston, concluding against the form of the by-law in such case made and provided, be sufficient, without concluding also against the form of the statute, *quære.*

THIS was a writ of *certiorari* to the Municipal Court for the city of Boston.

It appeared that a complaint was made to the Police Court by the city marshal, "in behalf of the commonwealth of Massachusetts," that Worcester, on the 28th of October, 1824, drove two or more horses drawing a cart, in one of the public

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streets of the city, "on a trot, and not at a moderate foot pace, against the peace of said commonwealth, and the form of the by-laws of said city in such case made and provided."

The case was afterwards carried into the Municipal Court, and there Worcester moved that the complaint and the proceedings thereon might be quashed; — 1. Because neither the Police Court, nor the Municipal Court, had jurisdiction over
463 the case; — 2. Because no law incorporating and authorizing the supposed city of Boston to make by-laws, nor any by-law by the supposed city made, was fully, plainly, substantially, and formally set forth, according to the laws and the constitution; — 3. Because the supposed by-law was null and void; — and 4. Because the complaint was in other respects informal and wholly insufficient in law.

This motion was overruled, and thereupon Worcester pleaded that he was not guilty of the offence charged in the complaint; and the jury being called, he offered a challenge to the array, stating that the *venire facias* issued from the Municipal Court, and was served by a constable of the city, and that the jurors were selected and drawn from the jury box of the city by the mayor and aldermen of the city, and that the judge of that court, the mayor and aldermen, and the constable, were ratable and rated inhabitants of the city, to which city one half of the penalty or fine mentioned in the supposed by-law was to accrue, and that the mayor and aldermen and jurors were concerned in the event of the issue to be tried. The attorney for the commonwealth demurred to the challenge, and it was considered by the judge that the panel of the jurors be affirmed.

The same objection was then made to the jurors individually, and to the witnesses on the part of the prosecution, but it was disallowed.

The attorney for the commonwealth offered in evidence a copy of the record of a by-law, made by the selectmen of Boston on the 22d of May, 1801, which provides, "that all carters and other persons having the care of any wagon, cart, truck, sled, or drag, passing through or in said streets of said town, shall drive their beast or beasts at a moderate foot pace, and shall not suffer them to go in a gallop or trot, under a

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penalty of not less than two, nor more than five dollars." He likewise produced a copy of an order of the city council, of the 2d of May, 1822, that all the by-laws of the town of Boston which were in force on the 30th of April, 1822, should be in force in the city of Boston. These writings were objected to as being of no validity; but they were admitted as sufficient evidence, that the by-law contained in the first writing had been adopted by the city. 464

Isaac Vose, a witness on the part of the government, testified that, on the 28th of October, 1824, he saw Worcester standing in an empty cart drawn by two or more horses, which he was driving on a fast trot, at the rate of from six to ten miles an hour, through Summer street; but that he saw no person in a situation to be endangered by such driving. He would not testify that all the horses were trotting. Simeon Dow, another witness on the part of the government, testified that Worcester, on the day above mentioned, was employed by him to drive a wood cart belonging to him; that there were three horses harnessed to the cart; that the leading horse usually walked so fast as to keep the others on a trot, but that he could not go, either on a walk or a trot, faster than at the rate of five miles an hour.

Worcester then offered witnesses to prove that he was reputed and known to be a prudent, steady, and careful driver; but their testimony was held to be inadmissible.

He then offered to prove, that before the 28th of October, verbal communications had been made by the mayor and aldermen and city marshal, whose province it was to enforce the by-laws of the city, to the drivers of carts, and particularly to Worcester, that they might drive through the streets on a moderate trot, and that no prosecution should be instituted therefor. This evidence was rejected.

He further offered to prove by witnesses, that if the drivers of such carts and carriages as are mentioned in the by-law, should be obliged to drive on a walk, it would be prejudicial to the inhabitants of the city, by impeding their lawful business and raising the price of wood and other articles of consumption, and that if the by-law is construed so to restrain

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them, it is unreasonable and contrary to the public good and therefore void. This evidence was rejected.

The judge delivered it as his opinion to the jury, that the evidence in the case was sufficient to prove the issue on the part of the commonwealth, provided they believed the testi-
465 mony of the witnesses; that the town of Boston, as sufficiently appeared, had authority to make the by-law in question, and that there was sufficient evidence to show it had been adopted by the city council of the city of Boston; that it was a good and valid by-law, and not unreasonable nor contrary to the public good; that the true intent and meaning of it was, to prohibit driving carts in the streets faster than at a moderate foot pace, so as to endanger persons standing or walking in the streets, and also to prevent the noise which would be occasioned by driving the horses on a trot or gallop; and that notwithstanding that, Worcester was driving in such a manner as that no danger did, or was likely to ensue therefrom to any person in the street, nevertheless it was their province to determine, whether he was driving contrary to the true intent and meaning of the by-law; and further, that if they believed that one of the horses could walk as fast as the others could trot, and was so walking during all the time that Vose saw Worcester driving, nevertheless, in such case, it was for them to decide, whether Worcester was guilty of driving the horses faster than at a moderate foot pace.

The jury thereupon returned a verdict, that Worcester was guilty of the offence charged against him.

March 18th. *Rand* and *W. Parker*, for the defendant. Neither the Police Court nor the Municipal Court had jurisdiction over this case, the judges being inhabitants of the city of Boston, and therefore interested in the penalty to be recovered. Bill of Rights, *art.* 29; *Day* v. *Savadge*, Hob. 87; *Hesketh* v. *Braddock*, 3 Burr. 1847; *Dr. Bonham's case*, 8 Co. 118; *Hawkes* v. *Inhab. Kennebeck*, 7 Mass. R. 461; *Boston* v. *Tileston*, 11 Mass. R. 468; *Gage* v. *Gannett*, 10 Mass. R. 176; *Inhab. Lincoln* v. *Prince*, 2 Mass. R. 544; *Pearce* v. *Atwood*, 13 Mass. R. 324; 1 Phillipps on Ev. (6th ed.) 50; Stark. on Ev. *vol.* 2, *p.* 776, *vol.* 3, *p.* 1062. No necessity

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exists for allowing them to have jurisdiction, for the proceedings might have been instituted before a justice of the peace in the town of Chelsea; so that this case is not like that of *Commonwealth* v. *Ryan*, 5 Mass. R. 90. If it should be held, however, that by virtue of any statute, no other court had jurisdiction, then we say the city was in fault in appropriating the penalty in such a manner as that no court can take cognizance of the case. 3 Burr. 1858. The *St.* 1821, *c.* 109, § 2, giving the Police Court jurisdiction over offences which may be cognizable by it according to the by-laws of the city, is unconstitutional, as applied to a case like this. But a breach of a by-law is not an offence. *The King* v. *Sharples*, 4 T. R. 777. The statute however might be construed to apply, where the penalty is appropriated in a different manner. Besides the pecuniary interest, the judges of these courts would be exposed to the suspicion of an improper bias, in consequence of their receiving salaries from the city. This complaint is in effect a civil process for the benefit of the city, and is brought improperly in the name of the commonwealth. The *St.* 1817, *c.* 50, § 3, allowing a remedy by indictment for a breach of the by-laws of the *town* of Boston, was virtually repealed when the town was changed into a city, and was likewise void, inasmuch as it suspended the operation of a general law by permitting the town to commence a process in its own favor before its own citizens. *Holden* v. *James*, 11 Mass. R. 396. Using the name of the commonwealth is a novel proceeding, which subjects the defendant in all cases to a loss of his costs, and throws on the commonwealth the burden of prosecuting for the benefit of the city. The city must be considered as a party; *The King* v. *Inhab. Hardwick*, 11 East, 578; *The King* v. *Inhab. Woburn*, 10 East, 395; 2 Kyd on Corp. 159 *et seq.*; and the warrant from the Police Court, being tested by an inhabitant of the city, was not conformable to the constitution, *pt.* 2, *c.* 6, *art.* 5.

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The supposed offence is not "fully and plainly, substantially and formally described" to the defendant, as required by Bill of Rights, *art.* 12. *Formally* means technically. The by-law ought to have been set forth. The defendant could not know what by-law was referred to in the complaint. In

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England they go further, and set forth the act of incorporation. *Kirk* v. *Nowill*, 1 T. R. 118; *Feltmakers' Company* v. *Davis*, 1 Bos. & Pul. 98; Com. Dig. *Parliament*, *R* 7; *Holland's case*, 4 Co. 76 *b*; *Prigge* v. *Adams*, Skin. 350. The offence, being stated to have been committed with force and arms and against the peace of the commonwealth, would naturally be understood as an offence against the laws of the commonwealth. The *St.* 1824, *c.* 28, § 5, may be said to authorize the omission of the by-law, but that act was never accepted by the city, and it is void also within the principle of *Holden* v. *James* before cited.

But the principal point in the case is, that the city government had no authority to pass such a by-law as the one on which these proceedings are founded. Similar questions have been much agitated in England; but cities there have an origin so different from ours, that they do not furnish an exact precedent. It will be found that their right to make by-laws regulating or restraining trade, is derived from ancient usage or a grant from the king or parliament respecting the particular subject of any by-law. 1 Rol. Abr. 364, *By-laws*, (*A*) *pl.* 5; *Bosworth* v. *Hearne*, 2 Str. 1085; Com. Dig. *Bye-law*, *C*, 4, 6, 7; Judgments of Orl. Bridgman, 323. It may seem from Com. Dig. *Bye-law*, *B*, 3, and 2 Kyd on Corp. 150, that cities may make such by-laws without a custom; but it is believed that a custom may be traced, either in the cases themselves to which they refer, or in books of customs. Our towns, generally, and the city of Boston, have no power to make by-laws, except what is given to them by the legislature. By *St.* 1785, *c.* 75, § 7, the inhabitants of each town are empowered to make "necessary rules, orders and by-laws, for the directing, managing and ordering the prudential affairs of such town," and to annex penalties, &c., provided they be not repugnant to the general laws of the government, and provided such orders and by-laws shall have the approbation of the Court of Sessions. By *St.* 1821, *c.* 110, § 15, the city of Boston has power "to make all such needful and salutary by-laws, as towns by the laws of this commonwealth have power to make and establish." It hence appears, that the city has no greater powers on this sub-

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ject, than towns generally, except where it may derive them from special statutes. The city has here assumed an authority which the legislature have reserved to themselves. On many subjects, equally suitable with the one under consideration to be regulated by by-laws, the legislature have either made regulations themselves, or expressly delegated their power by a special act; as in the case of livery stables, *St.* 1810, *c.* 124; pestilential diseases, *St.* 1792, *c.* 58; paving streets and removing obstructions in the same, *St.* 1809, *c.* 28, and *St.* 1799, *c.* 31; lighting streets, *St.* 1825, *c.* 3; chocolate mills, *St.* 1785, *c.* 15; wheeling on side walks, *St.* 1799, *c.* 31, § 5; raising goods into stores, *St.* 1816, *c.* 90; watchmen, *St.* 1801, *c.* 26. It would be impolitic to allow the city a general power to interfere with the right which every inhabitant of the commonwealth has to travel on the highway, and accordingly this subject has been frequently acted upon by the legislature. *St.* 1796, *c.* 82, § 8; *St.* 1791, *c.* 58. This by-law is unreasonable, because it is an impediment to carrying on business; and it is unnecessary, for where any injury is suffered from improper driving, the general laws afford a remedy.

The defendant's counsel also insisted upon the other objections raised at the trial.

Davis, Solicitor General, for the commonwealth. The pecuniary interest which the judges, &c., of the Police and Municipal Courts have, as inhabitants of the city, in one half of the penalty in question, may be considered as merely theoretical, it being much less in amount that our smallest denomination of money. If the supposed bias from receiving a salary from the city is to disqualify, it would not be in the power of the legislature to confer jurisdiction in such cases on any tribunal within the city; and to establish a tribunal in another county for these petty causes, so that in the last resort they should be carried to Salem or Cambridge or Dedham, would be a practical denial of justice. But this case comes directly within *Commonwealth* v. *Ryan*, which is recognised in *Pearce* v. *Atwood*; for under *St.* 1821, *c.* 109, § 2, the prosecution must have been brought before the Police Court. No other court had jurisdiction, and it was not in the power

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of the city to make the by-law in such a manner as to transfer the jurisdiction to another county.

Setting forth the by-law in the complaint is dispensed with by *St.* 1824, *c.* 28, § 5; and that act is not unconstitutional. If the legislature might pass a general law of the same kind, they might make a special law. The statute does not take away any rights; it is remedial, and simply dispenses with a matter of form.

In regard to the power of making by-laws, there is a distinction between corporations for public purposes, and private corporations for the management of property. There are no corporations anywhere similar to towns in New England. The power given to them to make by-laws must be construed with reference to their respective local situations, population, and wants; and this is contemplated by the second amendment of the constitution, making provision for the establishment of cities. The terms of the act incorporating the city of Boston are very general on this subject, and it should seem that any by-law required by its local situation and peculiar circumstances, and which this Court shall not deem to be oppressive, or unreasonable, or repugnant to the constitution or laws of the commonwealth, would be valid. The *St.* 1809, *c.* 28, § 2, 3, gives power to the selectmen of Boston to make by-laws on the very subject now in discussion. In many of the statutes referred to, in which special power to make by-laws has been given, money was required to be raised, as in those respecting lamps, watchmen, fire engines, &c. where it might well be doubted whether a town would have the power without a special statute; but I do not rely entirely on that ground It has been said, that by-laws like the one in question, made by cities in England, owe their authority to some ancient custom; but the case of *Bosworth* v. *Hearne*, as reported in Strange to that effect, is not supported by the report of the same case in Andr. 92, and is contrary to *Freemantle* v. *Company of Silk-Throwsters*, 1 Lev. 229; and it will be found that the validity of such a by-law does not depend on a custom, but on its being a reasonable by-law. See 2 Str. 1085, *in notis*. In the case of *Pierce* v. *Bartrum*, Cowp. 269, the mayor and common council of Exeter, under a gen-

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eral power given them by charter, *anno* 3 *Eliz.*, to make by-laws, made a by-law that no person should within the walls of the city slaughter any beast, under certain penalties; and it was held that this was a valid by-law, not being in restraint of trade, and that it was binding on strangers as well as members of the corporation.

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The *St.* 1817, *c.* 50, which provides that prosecutions or the by-laws of Boston may be in the name of the commonwealth, is continued in force by the city charter itself. The city is the same corporation as the late town of Boston. *St.* 1821, *c.* 110, § 1, 15; 1 Kyd on Corp. 232 *et seq.*

Rand, in reply. The city may to some purposes be considered as the same corporation with the town, but not with regard to a law determining the form of prosecuting offences against a by-law of the town, so as to make it apply to a by-law of the city. But we contend that the city is in fact a new body. The whole organization of the municipal government is changed by the act of incorporation. A town may have particular powers by special acts, and this may be necessary; but its mere local situation does not confer on it powers different from those of other towns to make by-laws. If it did, we should have a great diversity of regulations, which would be extremely inconvenient. The case from Cowper allows to the city of Exeter a power which none of our towns would think of claiming without a special statute. In the case from Levinz there was in fact a custom; and the court, in saying that a custom was not necessary to sustain the by-law, mean a special custom. Without a general custom to regulate trade it could not have been good. *Harrison* v. *Godman*, 1 Burr. 12; *Player* v. *Vere*, T. Raym. 288; and the authorities cited in the note to Strange. The *St.* 1809, *c.* 28, is said to give the city power in this particular case, but if so, the proceedings must have been different; the complaint must have been made by the selectmen, or by the mayor and aldermen as their substitutes. The penalty too in that statute is differently appropriated.

July 21st.

Wilde J. delivered the opinion of the Court. Sundry exceptions have been taken to the proceedings brought before us by the *certiorari* in this case, and the general question is,

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whether such errors are disclosed by the record as will require us to quash the proceedings. [Here his Honor stated some of the proceedings as above recited.] To these several decisions of the court below, the defendant excepted, and now objects. They all depend on the same principle; and the question is, whether the judges of the Police and Municipal Courts, and the jurors, and the city officers, had, as members of the corporation to which a portion of the penalty accrued, any such interest as should disqualify them to act in their respective offices, and whether for the same reason the witnesses were rendered incompetent.

By the common law no person is allowed to sit as judge or juror, or to testify, in a cause in which he is a party or has an interest. And a corporate interest, however inconsiderable and remote, is held to be sufficient to disqualify any member of a corporation. There are decisions the other way in relation to witnesses, but these decisions have been overruled. The Court will not relax the objection by inquiring into the degree of influence which may be supposed to exist, because any degree of influence may create an improper bias, and should operate as a disqualification. But such a disqualification may be removed by the legislature; and so it was ruled in the case of *Commonwealth* v. *Ryan*, 5 Mass. R. 90; and in the case of *The Inhabitants of Lincoln* v. *Prince*, the Court recognise the same principle.[1] So also has it been considered by the legislature. By *St.* 1792, c. 32, [see Revised Stat. c. 94, § 54,] it is provided, that the inhabitants of towns and members of societies may be admitted as competent witnesses in suits where the town or society is a party, or is interested in the event of the suit. And for more than thirty years this has been regarded as a valid, constitutional act.[2]

It is objected, however, that in relation to the judges and jurors the authority of the legislature is restrained by the 29th article of the Bill of Rights, which declares, that it is the right of every citizen to be tried by judges as free, impartial, and independent, as the lot of humanity will admit. The qualify

[1] See *Lincoln* v. *Prince*, 2 Mass. R. (Rand's ed.) 547, n. (*a*).

[2] See *Lufkin* v. *Haskell*, *ante*, 359, and note 1; Roscoe's Dig. Crim. Evid 110 to 112; 1 Stark. Evid (5th Amer. ed.) 145, and note.

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ing words in the declaration suppose that judges and jurors may have some degree of interest or feeling in all public prosecutions, for all are interested in the preservation of the peace; but if this interest is inconsiderable and not such as may be reasonably supposed to create a bias, it is not to be regarded. "It is for the legislature to say," as Chief Justice *Parsons* remarks in the case of the *Commonwealth* v. *Ryan*, "when this theoretic interest shall be no good objection to a juror." It is true that Lord *Coke* says, that if an act of parliament should ordain that the same person should be party and judge, or which is the same thing, judge in his own cause, it would be a void act of parliament; and Lord *Holt* says, that this is a very reasonable and true saying, and free from any extravagancy. And no doubt it is; but no such objection applies to the present case. The city of Boston is not a party to the prosecution, nor liable for costs. It is only entitled to a portion of a very trifling penalty, which, if divided among the inhabitants, could not possibly create any bias. But the inhabitants have no right to claim any dividend of the penalty. Their interest therefore is imaginary, and exists only in theory. To suppose that a recovery in this case would reduce the amount of taxes hereafter to be assessed, is altogether extravagant. In making provision for the administration of justice within the city, the legislature have determined that such an interest should not operate as a disqualification. By the 4th section of *St.* 1824, *c.* 28, it is provided, that no person shall be disqualified from acting as magistrate, juror, or witness, in certain suits or prosecutions, by reason of any interest which he may have as an inhabitant of the city of Boston in the sum or sums of money to be recovered.[1] We consider this as a valid and constitutional provision. But without relying on this provision, which perhaps is not applicable to this prosecution, it is a sufficient answer to the objection of interest, that jurisdiction is expressly given to the Police Court, and that the service of process from a justice in Chelsea within the city is prohibited. The witnesses in support of the prosecution were rendered competent by a former statute.

[1] See Revised Stat. *p.* 808, amendm. to *c.* 90, § 124.

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As to the evidence offered by the defendant, we think it was rightly excluded. It related to immaterial facts, which could have no influence except to mislead the jury. It was not a case involving the defendant's character, and the permission of the mayor and aldermen attempted to be proved was without authority and void.

So the evidence adduced to prove the by-law unreasonable, was clearly inadmissible. It was for the Court to decide whether the by-law was reasonable or not; and evidence to the jury on this point was irrelevant. But the evidence as stated would have proved nothing unreasonable in the by-law. It is not a law in restraint of trade, but it is a reasonable regulation of it, made for the good government of the city and to prevent a public nuisance. If it may be presumed somewhat to enhance the expense of transportation, this is more than compensated by many public advantages which result from it, so that on the whole the regulation is clearly a beneficial one.

Another objection, on which great stress has been laid, relates to the form of the complaint, which ought, as it is urged, to have set out the by-law at large. But if the statute dispensing with the necessity of thus encumbering the record is a valid law, this objection must fail. Perhaps, even without the aid of the statute, the courts below, being composed of citizens of Boston, were bound to take notice of the by-law, though generally, no doubt, a by-law must be pleaded.

We have not, however, any doubt as to the dispensing power of the statute. That it is limited in its operation to the city of Boston, is no objection to its validity. Surely the power of the legislature to pass a local act cannot be questioned. It is not only the right, but the duty of that branch of the government, so to vary the provisions of law, as to meet, so far as is practicable, the peculiar exigencies of every portion of the community. The forms of administering justice are not required to be uniform throughout the commonwealth. The Municipal and Police Courts are peculiar to the city of Boston, but it has never been doubted that they were properly
474 and constitutionally instituted. The object and effect of a local law is always to confer on a portion of the community some peculiar and exclusive benefits. All charters to coroo-

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rations are grants of exclusive privileges. But special laws are not void on account of their limited operation. It is therefore no objection to the statute under consideration, that it is confined to the city of Boston.[1]

Another objection made to the form of the complaint is, that it is in the name of the commonwealth. But this is expressly authorized by *St.* 1817, *c.* 50. This law is not repealed by the incorporation of the city. The act of incorporation, if it may be so called, did not annul the rights and privileges of the town. It only conferred on the then existing corporation a new name with additional powers.

We can find nothing erroneous in the judge's instructions to the jury.

It is provided by the by-law, that all carters, and other persons, having the care of any cart, wagon, sled, or drag, passing through or in said streets of said town, shall drive their beast or beasts at a moderate foot pace, and shall not suffer them to go in a gallop or trot.

Vose testified that he saw the defendant standing in an empty cart, with the reins to guide the horses in his hands, and driving the same, which was drawn by two or more horses, on a fast trot, at the rate of from six to ten miles an hour; and the judge instructed the jury, that the evidence, if believed, was sufficient to maintain the issue on the part of the commonwealth; and most certainly it was. But another witness gave it as his opinion, that the horses could not have moved with so great rapidity as was supposed by Vose; and the judge left it to the jury to decide upon the whole evidence, whether the defendant was guilty of driving the horses faster than at a moderate foot pace, contrary to the true intent and meaning of the by-law: and this was right.

It is also objected, that it was left to the jury to decide on the true meaning of the by-law; but there is no foundation for this objection. The judge gave his opinion as to the construction of the by-law, which was adopted by the jury, 475
and the construction was correct. Besides, in criminal prosecutions the jury are the judges of both law and fact.[1]

[1] See *Pierce* v. *Kimball*, 9 Greenl. 54; *Wales* v. *Belcher*, 3 Pick. 508.

[1] See 1 Chitty's Crimir al Law, (3d Amer. ed.) 626, note.

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Commonwealth v. Worcester.

One objection more only remains to be considered. The complaint concludes against the form of the by-law in such case made and provided. At present we are inclined to the opinion, that this is not sufficient; and that it ought to have concluded also against the form of the statute, by which alone this prosecution can be maintained.[2] But as this objection does not appear to have been made in the court below, and has not been argued, we will suspend the decision of the cause for the purpose of hearing counsel as to this point.

SUSAN GIBSON *versus* THOMAS CREHORE.

The *St.* 1816, *c.* 84, entitling a widow to one third part of the rents and profits of land of which she is dowable, until her dower shall be assigned, was not intended to give her a remedy against any person except the heirs of her husband. *Semble.*

When the purchaser of an equity of redemption takes an assignment of the mortgage, it shall or shall not operate as an extinguishment of the mortgage, according as his interest may be, and according to the real intent of the parties.

A gives his promissory note to B, with a mortgage of land as collateral security, his wife, the plaintiff, releasing her right of dower. A dies insolvent, and after condition broken, his administrators sell the equity of redemption to the defendant, who gives them a bond obliging himself to pay the debt to B, and enters into immediate possession. He accordingly pays that debt, and takes from B an assignment of the mortgage; and then mortgages the land to C. After this he makes a declaration in the presence of two witnesses, that he holds for condition broken, in order to foreclose the mortgage to B, giving no express notice to the plaintiff, and he continues in possession thereafter for three years. *Held*, that the payment of the debt to B, and the assignment, did not operate as an extinguishment of the mortgage so as to let in the widow to her dower; and that if her right of dower in the equity of redemption was not barred by the three years' possession, her remedy was by a bill in chancery, and not by an action under *St.* 1816, *c.* 84, for a third part of the rents and profits.

THIS was an action of *assumpsit* brought to recover one third part of the rents and profits received by the defendant from certain real estate described in the plaintiff's writ. The case was submitted to the determination of the Court upon an agreed statement of facts.

476 On the 18th of November, 1814, Abraham Gibson, the

[2] See *Commonwealth* v. *Gay*, 5 Pick. 44; 1 Chitty's Crim. Law, (3d Amer ed.) 290, note.

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husband of the plaintiff, being seised in fee simple of the estate in question conveyed the same to one Brooks by deed of mortgage, conditioned for the payment of a promissory note given by A. Gibson to Brooks for 15,000 dollars in one year (afterwards extended to two years) from date and interest. The plaintiff joined in this deed in relinquishment of her right of dower. On the 10th of July, 1816, A. Gibson died, and E. Farley and J. Gibson were appointed administrators on his estate. They afterwards represented it as insolvent, and thereupon a commission of insolvency issued; and Brooks presented his note to the commissioners, who allowed it as a debt existing against the estate, and returned it in their report to the judge of probate. The administrators paid to the other creditors of the estate 90 per cent. on their demands; but before any distribution was made, the amount of the note to Brooks was struck from the list of claims. On the 26th of November, 1817, the administrators, under a license from this Court, for the consideration of 4300 dollars, conveyed to the defendant all the interest which A Gibson had at the time of his decease in the estate in question; and the defendant at the same time gave them a bond obliging himself to pay the debt due to Brooks. The defendant immediately gave notice to the tenants of this estate that he had purchased it, and required them thereafter to pay the rents to him, which they consented to do, and ever since have done. On the 8th of January, 1818, Brooks, in consideration of 16,540 dollars paid him by the defendant, executed a deed, purporting to assign to the defendant and his heirs the mortgaged premises; and on the same day the defendant conveyed the same in mortgage to John Parker, with condition for the payment of 6000 dollars in eighteen months and interest, which was afterward, on the 6th of April, 1821, paid, and the mortgage discharged.

On the 13th of February, 1818, the debt mentioned in the condition of Brooks's mortgage being due and unpaid, (unless the facts stated operated as an extinguishment of it,) and the time limited for the payment being expired, the defendant, 477 in presence of C. Haven and R. P. Tolman, two of the tenants, entered the mortgaged premises, and caused those persons to subscribe a memorandum, which was agreed to be

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evidence in the case, stating that on the day last mentioned the defendant, in their presence, took peaceable possession, as he said, for the purpose of foreclosing the mortgage. Ever since this entry the defendant has been in quiet possession, and has received the rents from the tenants to whom the premises were leased by him. No memorandum of this entry and possession was made in the registry of deeds, nor was any notice given of the same, except that the defendant mentioned it to Farley and A. Cushing, with whom he happened to converse on the subject; and no part of the debt was paid or tendered to Brooks or the defendant, or in any way satisfied, unless by operation of law upon the facts agreed.

The plaintiff did not, before the commencement of this suit, demand of Brooks, or of the defendant, to set off her dower in the premises, nor has it ever been set off to her; but she did, on the 21st of August, 1817, demand of the administrators and of the heirs of her deceased husband, to set off her dower in all the real estate of which he died seised and possessed.

If, upon these facts, the Court should be of opinion that the plaintiff could maintain the action, judgment was to be rendered for damages; otherwise she was to become nonsuit.

March 25th

Gorham and *Cooke*, for the plaintiff. The assignment by Brooks, the mortgagee, to the defendant, who held the equity of redemption, was an extinguishment or merger of the mortgage, and lets in the widow to her dower. *Hitchcock* v. *Harrington*, 6 Johns. R. 290; *Collins* v. *Torrey*, 7 Johns. R. 278; *Coates* v. *Cheever*, 1 Cowen, 478, 479; *James* v. *Morey*, 2 Cowen, 246, 286, 291, 300, 320; Patch on Mortg. 183; *Snow* v. *Stevens*, 15 Mass. R. 278. If the defendant had made with Gibson himself a contract like that made with his administrators, engaging to pay him part of the purchase money and to extinguish the mortgage with the rest,

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the case would have been precisely similar to *Bolton* v. *Ballard*, 13 Mass. R. 227, and the widow would have been dowable. The administrators have virtually paid off the mortgage, and so the case is within *Hildreth* v. *Jones*, 13 Mass. R. 525. See also *Barker* v. *Parker*, 17 Mass. R. 564. It will be said, that the defendant entered for foreclosure, and

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continued three years in peaceable possession, pursuant to *St.* 1785, *c.* 22, § 2. But his entry was not adverse. No one was ousted, for he united in himself the two characters of mortgager and mortgagee. Patch, 202, 205. He had entered under his deed from the administrators, and no notice was given to the plaintiff, who was the only person who could redeem, that he intended to hold for condition broken. *Pomeroy* v. *Winship*, 12 Mass. R. 517; *Scott* v. *M'Farland*, 13 Mass. R. 314; *Thayer* v. *Smith*, 17 Mass. R. 429. A woman is now held to be dowable of an equity of redemption, and if this case is thought to come within the case of *Popkin* v. *Bumstead*, 8 Mass. R. 491, which was before that point was decided, then the plaintiff asks for a proportion of the rents and profits as a joint owner with the defendant of the equity of redemption.

Prescott and *A. Cushing*, *contrà*, cited *Popkin* v. *Bumstead*, as above; *Majory* v. *Putnam*, 4 Dane's Abr. 183; *Bird* v. *Gardner*, 10 Mass. R. 364; — and as to merger and extinguishment, *Gardner* v. *Astor*, 3 Johns. Ch. R. 55; *Starr* v. *Ellis*, 6 Johns. Ch. R. 395; *Lord Compton* v. *Oxenden*, 2 Ves. jun. 261; *Countess of Shrewsbury* v. *Earl of Shrewsbury*, 1 Ves. jun. 233; *Thomas* v. *Kemish*, 2 Vern. 348; *Jones* v. *Morgan*, 1 Bro. C. C. 217; *St. Paul* v. *Viscount Dudley and Ward*, 15 Ves. 173; *Forbes* v. *Moffatt*, 18 Ves. 390; *Wynn* v. *Williams*, 5 Ves. 130; Co. Lit. 338 *b*; 15 Vin. Abr. 362, *Merger* (*A.* 2).

July 31st.

PARKER C. J. delivered the opinion of the Court. This action of *assumpsit* for rents and profits of estate in which the plaintiff is alleged to be dowable, is supposed to be authorized by *St.* 1816, *c.* 84, which provides, "that in all cases where any person has died, or shall die seised of any estate, leaving a widow, who is lawfully entitled to dower therein, such widow shall be, and hereby is entitled to have and receive one 479 undivided net third part of the rents, incomes and profits of such estate, until the heir or heirs of such deceased person shall assign and set out to such widow her dower, according to law, or until the same shall be actually assigned and set out to her, under a judgment of court, or an order of a court of probate."

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This is the whole of the statute. It prescribes no form of action, and is certainly not of very easy interpretation in regard to the intent of the legislature, as to the cases on which it is to operate.

There is reason to believe, that this new remedy was intended only to be applied against the heirs of the deceased, who might refuse or neglect to have the dower seasonably assigned.[1] For heirs only are mentioned in the statute, as those who are to assign and set out the dower; and it cannot be supposed, that in all cases where the right to dower might be denied, so great a departure from the common law was intended, as to allow the title to be disputed and settled in an action of *assumpsit*. It is more probable, that as at common law, and by the preëxisting statute, in actions of dower no damage could be recovered, except from the time of a demand by the widow to have the dower assigned, the principal object was to give her a right in the rents, &c., from the time when her title to dower accrued, viz. the death of her husband, so that she might recover in the form of damages the amount thus due, without any demand, and that the rents and profits should be the rule of damages whenever she should be obliged to sue for her dower. So that it may be considered doubtful, whether an action of *assumpsit* was intended to be given by the statute, or whether any other change was contemplated, than fixing the rule of damages and superseding the necessity of a demand.

But waiving these considerations, which have not been much relied on in the argument, we will proceed to the inquiry, whether, upon the facts stated, the plaintiff is *lawfully* entitled to dower in the estate described in the writ; for if she is not, so that she could maintain her action at law or be entitled to
480 have an assignment by a decree of the probate court, she of course cannot support this action.

In the year 1814 the premises were mortgaged by her husband A. Gibson to Brooks, to secure the sum of 15,000 dollars, and she in due form of law released her right to dower. In 1816, A. Gibson the mortgager died, not having

[1] See *Gibson* v. *Crehore*, 5 Pick. 146

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paid the debt secured by the mortgage. There was a right in equity to redeem belonging to his estate, and this was sold under a license of court by his administrators, and the present defendant was the purchaser. On the 8th of January, 1818, Brooks, the mortgagee, executed his deed of assignment to the defendant, of the mortgaged premises, having received from him the amount of his debt and the interest, being 16,540 dollars; and on the same 8th day of January, the defendant conveyed the premises in mortgage to Parker, to secure 6000 dollars and interest, payable in 18 months, and on the 6th of April, 1821, this debt was paid and the mortgage discharged.

It is contended by the plaintiff's counsel, that these transactions amount to a payment of the debt to Brooks, and an extinguishment of the mortgage; so that the widow is entitled to dower, in the same manner as though no mortgage had ever been made. If this be so, the defendant would manifestly be a great sufferer, as he has paid the whole value of the estate, consisting of the debt to Brooks and the sum paid for the equity of redemption; and the widow would gain an unjust advantage, the law presuming that she was paid a consideration for her dower to the extent of the sum secured by the mortgage deed.

It is therefore on technical ground only that she can expect to succeed in her present claim, and on this ground the cause has been argued; viz. that Crehore, by the purchase of the equity, became virtually the mortgager, and then having satisfied the claim of the mortgagee, the mortgage is paid and discharged, without regard to the form which was chosen by the parties to give legal effect to the transaction; that there is in truth no subsisting mortgage, the very object of it having been answered by the satisfaction of the debt. The course of the argument admits, that if the defendant is in legal contemplation now the assignee of an undischarged mortgage, the plaintiff has no claim in law, whatever she may have in equity, as being dowable of the right of redemption. And this may well be admitted, for surely the plaintiff, having relinquished her right of dower upon the mortgage, could not maintain her claim against the mortgagee or his assignee. The case of *Popkin v. Burnstead*, 8 Mass. R. 491, is stronger than the present

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to this point. There the assignee of the mortgager paid the debt to the mortgagee, and the latter entered a discharge of the mortgage upon the record, which is a mode prescribed by the statute for the discharge of a mortgage; but the widow was held not entitled at law to her dower, because it would be to defeat the very purpose of the payment by the assignee, which was to give assurance to his own title.

Several cases have been cited, to show that widows are entitled to dower in the equity of redemption of mortgaged estates; and without doubt they are against all but the mortgagee and those claiming under him, and they may enforce their claims at law.[1] So also if the mortgage is discharged by the husband in his lifetime, or by his executors or administrators out of the proceeds of his estate, the right of the widow which had been suspended revives, and she may proceed to recover her dower, just as if there had been no mortgage. But against the mortgagee or his assignee her right is only in equity, and it is only by a bill in equity, and by paying her due proportion of the debt, that she can avail herself of her right;[2] and without doubt the executors and administrators, if there be personal estate whereby the debt may be discharged, may be compelled to contribute their just proportion in order to liberate the estate for the heirs, or for the creditors, if it should be for their interest to have the estate redeemed, and to enable the widow to have her dower.

But it is insisted, that the assignment of the mortgage in this case is mere matter of form, and that the law will give it no
482 other operation than as evidence of payment and discharge of the mortgage. No doubt it has this effect against the mortgagee himself; he has received his debt, and can have no further claim; but the question seems to be, whether the interest of

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[1] See Revised Stat. c. 60, § 2; *Sheafe* v. *O'Neil*, 9 Mass. R. (Rand's ed.) 13, n. (a); *Snow* v. *Stevens*, 15 Mass. R. (Rand's ed.) 280, n. (a); 2 Powell on Mortg. (Rand's ed.) 699, n. (1).

[2] See Revised Stat. c. 60, § 2; *Gibson* v. *Crehore*, 5 Pick. 146; *Carll* v. *Butman*, 7 Greenl. 102.

An assignment of dower is not necessary, to enable the widow to maintain a suit in equity for the redemption of the mortgage. *Gibson* v. *Crehore*, *ubi supra*.

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the assignee can be preserved against the widow claiming her dower, she having once relinquished it; and the authorities are very satisfactory upon this point. When the purchaser of a right to redeem takes an assignment, this shall or shall not operate as an extinguishment of the mortgage, according as the interest of the party taking this assignment may be, and according to the real intent of the parties.[1] Now the interest of the defendant is altogether in upholding the mortgage, and it must have been his intent so to do, or this form of transaction would not have been adopted.

Mergers are odious in equity, and shall not be allowed where the estates may well stand together. Thus if lessee for years make the lessor his executor, the term is not drowned, because the lessor has the freehold in his own right and the term in *auter droit*. Co. Lit. 338 *b*; Vin. Abr. *Merger*, (*A.* 2) *pl.* 1. Now the defendant purchased the right in equity of the administrators of the mortgager, and that right may well stand with the assignment to him by the mortgagee.

This doctrine of giving effect to the assignment, according to the interest of the assignee, is fully explained and decisively settled in the court of chancery in England and in New York, and it is a principle very suitable for application in the present case, because it promotes substantial justice, and deprives no one of any just privilege or advantage. *St. Paul* v. *Viscount Dudley and Ward*, 15 Ves. 173; *Forbes* v. *Moffatt*, 18 Ves. 390; *James* v. *Morey*, 2 Cowen, 246.

In Co. Lit. 208 *a*, Butler's note 105, analogous principles are settled; but the doctrine against dower is carried further.

See *Hunt* v. *Hunt*, 14 Pick. 374; *Gibson* v. *Crehore*, 5 Pick. 146; *Thompson* v. *Chandler*, 7 Greenl. 377; *James* v. *James*, 6 Johns. Ch. R. 417; *Gardner* v. *Astor*, 3 Johns. Ch R. 55; 3 Powell on Mortg. (Rand's ed.) 1089 *a*, n. (1).

If after an equity of redemption has been sold on execution, the mortgagee convey all his interest in the land to the mortgager, it will operate as an assignment, and not as an extinguishment of the mortgage. *Barker* v. *Parker* 4 Pick 505.

But if the mortgager be seised of the equity of redemption at the time of the conveyance to him by the mortgagee, the mortgage will be extinguished ibid. · *Wade* v. *Howard*, 6 Pick. 492.

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If a term is raised by way of mortgage, and a purchaser takes to himself the term, the widow, if the marriage was after the mortgage, is not dowable even in equity, although the husband were always seised of the inheritance.

483 But it is thought that the fact of the defendant's having, at the time of his purchase of the right of redemption, entered into a bond or covenant to pay the debt to Brooks, puts him in a worse condition than he would otherwise be in, and deprives him of the power of assuming the character of an assignee of the mortgage. Why should this make a difference? The debt being secured by note, as well as mortgage, it was proper that the administrators should take care that in no event the estate should be called upon for payment of the debt. It was proper, therefore, that they should exact security to effect this object, but the legal character of the whole transaction is in no respect changed thereby.

Nor does the fact that the defendant, after taking the assignment from Brooks, conveyed the premises in mortgage to Parker, hinder him from claiming to hold as assignee of the mortgage. The deed to Parker would convey all the interest which the defendant had, whether as owner of the fee simple unconditional, or as assignee of the mortgage, but does not prevent him from insisting, as against the widow, to hold as assignee.

The supposed entry of the defendant on the 13th of February, 1818, a few weeks after the assignment from Brooks and conveyance to Parker, whether valid or not to foreclose the right of redemption, and so to bar the widow of dower, is at least strong evidence of the intention of the defendant to consider the original mortgage as subsisting; and this intention, as will appear by the authorities cited, is decisive of the right in the defendant so to consider his claim.

That the widow's right to be endowed by virtue of the equity of redemption remaining in her husband at the time of his mortgage to Brooks, still subsists, unless the entry above mentioned and possession under it for three years, amount to a foreclosure, cannot be denied. But this is not a right which can be enforced at law against the defendant, who represents the original mortgagee. It is only by a bill in chancery, under

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which the equitable extent of her claim can be adjusted, and her due proportion of the rents and profits taken into the account, that her right can be enforced in a manner which will give her all that she is entitled to, without manifest injustice to the party against whom she claims.[1]

Plaintiff nonsuit.

JOHN EATON *versus* RUGGLES WHITING.

Land mortgaged cannot be attached on mesne process for the debt of the mortgagee, before he shall have entered on the same, nor, *it seems*, before foreclosure.

A conveyance of land, on condition that if a debt due from the grantor to the grantee shall be paid within a certain time, the deed shall be void, with a power to the grantee, in case the debt shall not be so paid, to sell the land and apply the proceeds to the extinguishment of the debt, and pay over the surplus to the grantor, constitutes a mortgage, until the power shall be executed.

ASSUMPSIT. The defendant was called in the writ, of Louisville in the State of Kentucky, and there was no service except by the attachment of two parcels of land. The defendant, upon oyer of the writ, declaration and return of the officer, pleaded in abatement of the writ, that he had no right, title, interest or property in the land, that could be attached on the writ; and issue was taken on that fact.

The plaintiff, to maintain the issue on his part, produced a deed indented between John Peck and Whiting the defendant, dated the 31st of March, 1810, and recorded on the 11th of April following, in which Peck, after a recital that he stood indebted to Whiting in the sum of 3000 dollars, for which he had given his promissory note of even date with the indenture, payable in twelve months, conveyed to Whiting in fee a parcel of land, in trust, that Whiting, his heirs or assigns, should and might, at the expiration of thirteen months from the date, or at any time thereafterwards, sell the granted premises, if he or they should think fit, by public auction, and apply the proceeds of such sale, in the first place to pay the 3000 dollars and interest and the expenses of the sale, and then to pay

[1] See *Gibson* v. *Crehore*, 5 Pick 146; *Carll* v. *Butman*, 7 Greenl. 102.

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over the surplus, if any, to Peck, or his assigns; provided, nevertheless, that if Peck, his heirs, &c., should pay the 3000 dollars and interest within the thirteen months, the indenture should be void.

The plaintiff also produced another deed indented between Peck and Whiting, dated the 2nd of February 1810, and recorded the next day, conveying another parcel of land to Whiting, with a similar power to sell after fifteen months, in case the sum of 3500 dollars and interest, for which a promissory note had been given, should not be paid within that time, and a similar proviso, that upon a payment within that time the indenture should be void.

The defendant produced a deed dated the 8th of March, 1810, but not recorded, whereby he conveyed to Ebenezer Francis the deed and note last mentioned, and all his right, title and interest in the parcel of land described in the deed, on the same trust and subject to the same condition. He also produced a deed of release and warranty from Peck to Francis of the same parcel, dated the 27th of November, 1811, and recorded on the 16th of January, 1812.

Upon these facts the defendant contended, that his interest in these parcels of land, being only that of a mortgagee, was not liable to be attached as his property, but the Chief Justice instructed the jury otherwise; and thereupon a verdict was returned for the plaintiff, subject to the opinion of the whole Court.

March 30th.

Bartlett, for the defendant, now insisted that the indentures were merely mortgages. Whenever it appears on the face of a deed, that the land is conveyed as a security for a debt, and is redeemable, it constitutes a mortgage. 2 Cruise's Dig. 89, *tit.* 15, *c.* 1, § 11; *Parks* v. *Hall*, 2 Pick. 211. Nor does the introduction of a power to sell, alter the case. Such a power was formerly held to be void, but by later decisions it is considered valid, as the original owner, by having the surplus proceeds of the sale paid to him, has his rights preserved. But a mortgage with a power to sell, is still a mortgage until the power is executed; and that is the present case. *The King* v. *Inhab. of Edington*, 1 East, 288; *Croft* v. *Powel*, Com. Rep. 608; Coote on Mortg. 128; *Corder* v. *Morgan*,

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18 Ves. 344; 2 Bird's Conveyancer, 127. That a mortgagee's interest cannot be attached, is settled in *Blanchard* v. *Colburn & ux.* 16 Mass. R. 345; *Huntington* v. *Smith*, 4 Connect. R. 234; *Jackson* v. *Willard*, 4 Johns. R. 41. An attachment and levy would not be an execution of the power, for this must be done by the voluntary act of the attorney; and further, the particular mode in which the power is to be executed is here marked out. But suppose the interest of Whiting attachable, the creditor would attach with notice of the trust, and so subject to the trust. 3 Mass. R. 576; 1 Cruise's Dig. 525 *et seq.*; *Croft* v. *Powel*, Com. Rep. 609. If the defendant's interest can be considered not a mortgage, but only a trust estate, the attachment is invalid. 1 Cruise's Dig. 523; 4 Dane's Abr. 253; *Russell* v. *Lewis*, 2 Pick. 511. Nor does it make any difference, that the characters of trustee and *cestui que trust* are here united in one person, since they are not co-extensive, so as to merge the equitable in the legal estate. 1 Cruise's Dig. 495.

Fletcher, for the plaintiff. If this were a case simply of mortgage, the decision in *Blanchard* v. *Colburn* might be conclusive against us. But we say that the conveyances are mortgages, and something more, in consequence of the power to sell. The Court held, that the interest of the mortgagee could not be attached, because of the inconveniences growing out of the right of redemption. Here that difficulty does not exist, for the mortgagee could convey an irredeemable estate. In *Croft* v. *Powel* the question was, whether the mortgagee *had* conveyed an irredeemable estate; it was admitted that he might have done it. See 3 Barton's Elem. Convey. 305 and 309, note; *Clay* v. *Sharpe*, and *Corder* v. *Morgan*, cited in Coote on Mortg. 132 *et seq.*; 1 Powell on Mortg. (5th ed.) 12, note. It is said that the mortgagee here is limited to a particular mode of executing the power; the fair construction, however is, that if he should not be able to sell at private sale, he might have recourse to a sale by auction; and this was the understanding of the parties themselves. This is not a trust estate, for then the trustee would be a mere channel of conveyance for the benefit of the *cestui que trust*; but the conveyance is to be for the mortgagee's own benefit. As there is no

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adjudged case precisely in point, the Court will favor the right of attachment, in accordance with the spirit of our statutes. If property thus situated cannot be attached, it will be out of the reach of the creditors both of the mortgager and mortgagee, while the mortgagee will have the whole control of the land. It is said, that the attaching creditor must take a trust estate. Admit that, and our action will be sustained. Whether it is practicable in a levy to separate the interests of the mortgager and the mortgagee, is a question. It does not seem to come within the principle of a levy on land of a joint tenant, nor of a levy by metes and bounds. Our view however is, that the creditor has a right to levy on the whole land, and that a personal claim on the mortgagee will remain to the mortgager; as in the case of a sale of an irredeemable estate by the mortgagee, and a misapplication of the purchase money. The interest of the defendant, coupled with the power, constitutes absolute property, according to the chancery decisions, and the creditor of the mortgagee may attach and levy on such property. An appropriation of it in this manner to the debt of the mortgagee, will be equivalent to an execution of the power.

Shaw, in reply. The argument for the plaintiff seems to be, that the mortgagee had power to convey an irredeemable estate, and he therefore had such an estate in himself; which is a *non sequitur*, the very nature of a power being to enable a person to convey an estate in which he has no interest. It is not necessary to deny the English authorities, that the grantee of such a mortgagee may have an absolute title; for by the same authorities the mortgagee, previous to a sale, has only the estate of a common mortgagee. He may either act under the power, or he may, as mortgagee, assign the mortgage, and the assignee will take the same estate which he held. The power must be strictly executed. The terms of it must be performed literally, as to a volunteer, and
488 substantially, as to other persons. 4 Cruise's Dig. 229, *tit.* 32, *c.* 16; *Wright* v. *Wakeford*, 17 Ves. 454. A court of equity will sometimes support a defective execution of a power, but will never supply the non-execution of it. Ibid. *tit.* 32, *c.* 17, § 25. Supposing the power here to be valid,

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there has been no sale under it. The deed from Whiting to Francis was an assignment of the debt and mortgage, and not a sale of the land; which, by the terms of the power, must have been by auction. It is a most extraordinary position, that an attachment and levy against the will of the defendant for the benefit of his creditor, will be an execution of a power, which is a personal confidence in the defendant and his assigns, and to be exercised if he or they think fit, and by a sale at auction, and which a court of equity would not compel him to execute for the benefit of his creditors. Cruise's Dig. *tit.* 32, *c.* 17, § 29, 30. It is said, that the mortgager will have a personal demand on the mortgagee; but where land is subject to a trust, the trust follows the land, if the grantee has notice, as he must have here from the mortgage deed itself.

PARKER C. J. delivered the opinion of the Court. The *July 21st* opinion expressed in the case of *Blanchard* v. *Colburn & ux.* 16 Mass. R. 345, that the interest of a mortgagee, in real estate mortgaged to him for security of a debt, or the performance of a condition, is not liable to be levied upon for the debts of the mortgagee, and so of course not liable to attachment on mesne process, we see no cause to change. It is in fact but a chose in action, at least until entry to foreclose, and although the legal effect of the mortgage is to give an immediate right of entry or action to the mortgagee, yet the estate does not become his, in fact, until he does some act to divest the mortgager, who, to all intents and purposes, remains the owner of the land until the mortgagee chooses to assert his right under the deed. It is, as before said, in the nature of a pledge, and a pawn or pledge cannot be seized in execution for the debt of the pledgee. The mortgager may be compelled to pay over the debt to the creditor of the mortgagee on the trustee process, with the same exceptions as are provided for other cases, and payment under such process will discharge the mortgage *pro tanto;* so that the creditor of 489
the mortgagee is not without remedy, as has been suggested. The law in New York and Connecticut is the same as with us. In the courts of both those States it has been decided, that a mortgagee before entry has not such an interest in the land

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as can be sold, levied upon, or attached. See *Jackson* v *Willard*, 4 Johns. R. 41; *Runyan* v. *Mersereau*, 11 Johns. R. 534; *Johnson* v. *Hart*, 3 Johns. Cas. 329; also *Huntington* v. *Smith*, 4 Connect. R. 237, in which *Hosmer* C. J. states at large the reasons, similar to those given in *Blanchard* v. *Colburn & ux.* by this Court. Before the case of *Blanchard* v. *Colburn & ux.* the same principle had been decided in the case of *Portland Bank* v. *Hall*, 13 Mass. R. 207. So that we are warranted in considering it as settled law, that the interest of a mortgagee before entry is not attachable; and we might add with *Hosmer* C. J. in the case cited from Connect. Rep., that we doubt whether it is attachable before foreclosure, for until then all the inconveniences suggested as the ground of decision would occur [1]

The plaintiff in this case, then, in order to sustain his suit, must show that the property attached as the defendant's is something more than a mortgage interest, for as he is not an inhabitant of this commonwealth, and was not within its jurisdiction when the writ issued, he can be held to answer only by the attachment of real or personal estate belonging to him liable to be attached or seized on execution.

The property returned as attached consists of two parcels of real estate, formerly belonging to John Peck, who, by deed of indenture, on the 2d of February, 1810, conveyed one of the pieces to Ruggles Whiting the defendant; and by a like deed of indenture, made on the 31st of March, 1810, conveyed the other piece to the same Ruggles Whiting. On the 8th of March, 1810, Whiting, by deed, assigned and conveyed all his right and interest in the deed and land first mentioned to Ebenezer Francis. This deed of Whiting to Francis was acknowledged by Whiting on the 15th of the
490 same March, but has never been recorded. The other tract described in the deed of indenture first mentioned, has not been conveyed by Whiting. So that whatever estate passed to Whiting by the indentures, may be supposed, for the sake of the question, to have remained his, as regards his creditors, to the time of the supposed service of the plaintiff's writ

[1] See 1 Powell on Mortg. (Rand's ed.) 255, n. (1).

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upon him. What estate, then, passed by these two deeds to Whiting? If any estate in possession, so that in point of law it can be called his real property, then of course it is liable to attachment, whether it be a fee simple, freehold, or an estate for years; for by our law all such estates may be seized on execution, and therefore may be attached. On the other hand, if by these deeds only a mortgage for security of debt was created, then, for the reasons before given, it is not liable to execution or attachment.

Both deeds contain a recital setting forth that Peck the grantor was indebted to Whiting, and both contain a provision, that if the sums admitted to be due shall be paid within specified times, the deeds shall be void. Thus far we have even the common characteristics of a deed of mortgage expressly made as collateral security for a debt. At the same time with the deeds promissory notes were given by Peck to Whiting, which were also to become void on payment of the sums intended to be secured. The deeds are also in trust, but as Whiting the creditor is the trustee, and as the payment of his debts was the first object of the trust, the nature of the conveyance is not altered thereby. But it is further provided, in the first deed, that after fifteen months from the date, and in the second, after thirteen, if the money due shall not be paid, Whiting may sell and convey the lands described, at public auction, and from the proceeds pay himself the amount due and expenses, and the balance over to Peck. Now it is contended by the plaintiff, that this power to sell so alters the character of the conveyance, as to deprive it of the qualities of a mortgage, or else superadds qualities which enlarge the estate in Whiting, so as to render it subject to his debts by attachment and levy. We have not seen any authorities which will justify us in adopting this opinion; on the contrary, all 191
the authorities cited have a tendency to show, if they do not distinctly decide, that where the transaction between the parties to the conveyance is in truth and in fact a security for debt or loan, it shall have all the attributes of a mortgage, notwithstanding there may be an unlimited power to sell. Conveyances of the kind are invariably thus treated in chancery, and even when the parties have attempted in that form of convey-

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ance to deprive it of the character of a mortgage, still if it appear to have been a security for debt, the Court will let the debtor in to redeem. So if there be a limited period within which the mortgager shall redeem, as during his life, his heirs shall nevertheless be allowed to redeem. *Howard* v. *Harris*, 1 Vern. 192. And if there be an agreement to make the conveyance absolute upon payment by the mortgagee of a further sum, if the money lent be not paid at the day appointed, yet the mortgager may redeem in spite of this agreement. For where the real transaction is security for a loan, the law deems all restrictions upon the right to redeem, unconscionable advantages taken by the creditor of the necessities of the debtor. *Manlove* v. *Ball*, 2 Vern. 84; Co. Lit. 203, Butler's note 96.[1] An instrument of conveyance, therefore, which appears on the face of it, or by contemporaneous instruments, to be intended as security for the payment of a debt or the performance of other conditions, does not lose this character while the estate remains in the hands of the grantee, although he may have power to convey the estate free from such incumbrance. A power to sell *executed* to one who relies upon such power, and expects and intends to purchase an absolute estate, will without doubt pass an unconditional estate to the purchaser, though this form of conveyance is rare in this country. But while the power remains unexecuted, the relation of mortgager and mortgagee subsists, if that was the relation created by the instrument separate from the power; but even under such a power, it has been held in England, that if the purchaser knows the original nature of the transaction, and appears not to have purchased wholly without reference to the
492 conditional character of the title, he will be compelled in equity to surrender it, on receiving the money he has advanced. See *Croft* v. *Powel*, 2 Com. Rep. 607.

We do not find any thing in the authorities cited by the plaintiff's counsel that contradicts the principle, which seems well founded in equity, that a power in the mortgagee to sell, *unexecuted*, leaves the estate as it would be if no such power existed. The right of redemption, which is the true *indicium*

[1] See 1 Powell on Mortg. (Rand's ed.) 187 *a*, note.

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of a mortgage, remains in the mortgager and his representatives, until it shall be foreclosed by entry or judgment, with possession as prescribed by law, or until, availing himself of his power, the mortgagee shall have made a conveyance pursuant to it, to some one who shall intend to purchase an irredeemable estate.

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Verdict set aside.

David Homer *versus* Ebenezer W. Thwing *et al.*

An infant, who hires a horse to go to a place agreed on, but goes to another place in a different direction, is liable in *trover*, for an unlawful conversion of the horse.

Trover for a horse. One of the defendants was defaulted. Thwing, who was an infant, defended by guardian.

The plaintiff offered evidence, that the horse was let by him to the defendants to drive in a chaise to the Punch Bowl in Brookline, and that they went to Fresh Pond in Cambridge without leave, and afterwards to the Punch Bowl; and that the horse was returned much injured.

The counsel for Thwing contended, that as this was a transaction arising originally on contract, in which the infancy of Thwing would have been a good defence, the plaintiff should not recover upon the same facts by changing the form of his action to tort.

But the jury were instructed, for the purposes of this trial, that the action would lie against Thwing, notwithstanding his infancy; and a verdict was found for the plaintiff. 493

If the Court should be of opinion, that the instruction to the jury was wrong, the plaintiff was to be nonsuited; but otherwise, judgment was to be entered according to the verdict.

Dunlap now insisted upon the objection made at the trial. *Jennings* v. *Rundall*, 8 T. R. 335, is decisive of this case. The wrong here arises out of a contract, belonging to the third class of bailments in *Coggs* v. *Bernard*, 2 Ld. Raym. 913, but the wrongs for which infants are responsible must arise

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wholly *ex delicto*. *Johnson* v. *Pie*, 1 Lev. 169, and 1 Keb. 905, 913. If the facts here would furnish a good defence to an action on the contract, they will to an action of tort; for the Court will look at the substance, rather than the form of the action. *Bristow* v. *Eastman*, 1 Esp. R. 172; *S. C.* Peake's Cas. 222; *Manby* v. *Scott*, 1 Sid. 129. In *Jennings* v. *Rundall* it is said, that trover will lie against an infant; but that must be where his conduct is wholly tortious. That was an action against an infant for riding immoderately a mare which had been delivered to him to be moderately ridden, and the declaration contained a count in trover, and yet the action could not be sustained. See also 1 Dane's Abr. 143; 1 Chit. Pl. 65; 1 Pothier on Obligations, 71. The only case which seems to have a contrary bearing, is that of *Wheelock* v. *Wheelwright*, 5 Mass. R. 104. That case was decided without any allusion to the distinction now taken in respect to an infant, that his acts must be wholly tortious to sustain an action. In the case at bar there was only a constructive tort, for which an infant is not liable.

S. D. Parker, for the plaintiff, relied on the case last cited of *Wheelock* v. *Wheelwright*.

July 22nd. Morton J. delivered the opinion of the Court. The defence in this case is infancy. It is contended, that this action is founded in contract, and that the defendant cannot be ousted of this defence by changing the form of action from contract to tort.

494 Infants are liable in actions arising *ex delicto*, but not in those arising *ex contractu*. The defendant however contends, that there is a qualification of this rule, and that infants are liable for positive wrongs only, and not for constructive torts. But we know of no such distinction, and in the case of *Jennings* v. *Rundall*, so much relied upon by the defendant's counsel, it is expressly rejected. It is true, that an infant cannot become a trespasser by any prior or subsequent consent. But he may be guilty of torts, as well by omissions of duty, as by the commission of positive wrongs. 1 Chit. Pl. 65; [6th Amer. ed. 87;] Co. Lit. 180 *b*, Butler's note 56. He is also liable for frauds, as well as for torts. And his liability is to be determined by the real nature of the transaction, and

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not by the form of the action. 1 Dane's Abr. 143; 1 Esp. Rep. 172.

Although an infant shall not be charged in trover for goods sold to him with a knowledge of his infancy, (*Manby* v. *Scott*, 1 Sid. 129,) and although an action will not lie against an infant for affirming himself to be of full age in the execution of a contract, (*Johnson* v. *Pie*, 1 Lev. 169, and 1 Keb. 905,) yet detinue will lie against an infant for goods delivered upon a special contract for a specific purpose, after the contract is avoided; *Mills* v. *Graham*, 1 New Rep. 140; and assumpsit will lie against an infant for money embezzled; for the Court will look through the form of the action into the tortious nature of the transaction. 1 Esp. Rep. 172.

It has been holden, that trover will not lie against an infant for immoderately using a horse which he had contracted to use moderately, on the ground that the action could only be supported upon the contract. *Jennings* v. *Rundall*, before cited. But in the case at bar, the driving of the horse beyond the place to which the defendant had permission to go, was a conversion, and trover is the proper remedy. In the case of *Wheelock* v. *Wheelwright*, 5 Mass. R. 104, which in the facts, as well as the principles, is similar to this, it was decided, not only that *case* for improperly using the horse would not, but that *trover* was the only action which would lie.

Whenever trover is the proper form of action, it will lie against an infant. The defence therefore is insufficient, and judgment must be entered on the verdict.[1] 495

[1] See *Campbell* v. *Stakes*, 2 Wendell, 137; 10 Amer. Jurist, 107. But see *Penrose* v. *Curren*, 3 Rawle, 351; *Schenck* v. *Strong*, 1 Southard, 87; *Curtin* v. *Patton*, 11 Serg. & Rawle, 310

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JOHN PETERS *et al. versus* JOSEPH BALLISTIER *et al.*

Where it was agreed before the sailing of a vessel, that the bill of lading of the cargo should be assigned as security for a debt, but the assignment was not made until after she had sailed, though by being antedated it purported to have been made while she was at home, and no possession of the property was taken, it was *held*, nevertheless, that the assignment was valid as between the parties, and as against strangers who should not acquire a legal title to the property without notice of the assignment.

The owner of a ship and cargo sent them to the West Indies, directing the master to sell the cargo, and bring or send home a return cargo, the principal object of the voyage being the freighting business among the islands, and also directing him to manage the voyage in such manner as in his opinion should be most advantageous. The master accordingly sold the outward cargo, and purchased a return cargo, but found no opportunity to send it home. It was *held*, that even if he might be justified in selling it again for the purpose of going into the freighting business, or with an ultimate view to a return cargo, yet that he was not authorized to sell it to a creditor of his owner for the purpose of paying the debt, notwithstanding such creditor threatened, in case of his refusal, to detain the vessel and cargo by legal process.

Held, also, that such a sale not being in the ordinary course of business, the owner was not left to his remedy against the master only, but that he might disaffirm the sale.

The value of the property thus sold being greater than the amount of the debt, the creditor paid the master the balance in money; and this balance was applied by an agent of the owner to the disbursements of other vessels which had belonged to him, but which had been transferred to the assignee of the bill of lading before mentioned. The assignee wrote to the creditor, claiming repayment of the amount of the debt, which was refused, and he then brought an action of *assumpsit* to recover the same amount. That action he discontinued, and afterwards brought *trover* for the whole of the property sold to the creditor. *Held*, that the assignee had not affirmed the sale, but that it would have been otherwise, if he had not discontinued the action of *assumpsit*. *Held*, also, that *trover* lay for the whole property sold, but that the creditor might maintain an action against the assignee for the balance that had been paid to the master on a contract which failed, and had been expended for the benefit of the assignee.

TROVER for several hogsheads of molasses. Plea, the general issue.

To prove their property, the plaintiffs produced a bill of lading, made on the 11th of May, 1822, of certain articles
496 shipped on board of the brig Enterprise, Paul E. Merrill master, then at Portland, and bound for the West Indies, in the name and for the account of William Gordon the owner. On the bill of lading was an indorsement by Gordon, stating that "the property named in the bill of lading, or the pro-

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ceeds thereof, was to be subject to the orders of the plaintiffs, and pledged to them for the security of 7400 dollars," which they had advanced to Gordon, to enable him to procure the cargo. This assignment, though bearing date of the 11th of May, was not made and signed until after the 1st of June; but it had been agreed between the plaintiffs and Gordon, before the cargo was shipped, that the bill of lading should be so assigned to them as security. The vessel sailed on the 16th of May; no actual possession of the cargo having been taken by the plaintiffs, and Merrill having no knowledge that the bill of lading was to be thus indorsed, or that the plaintiffs had any interest in the cargo. In the instructions given to Merrill before he sailed, dated May 13th, 1822, he is directed to go to Point Petre, in Guadaloupe, where, says Gordon, "you are to do the best you can for my interest; and in the prosecution of the voyage, your own judgment will be relied upon in its management as in your opinion will be most advantageous." Merrill proceeded to Point Petre, where he sold part of his cargo, and with the proceeds purchased the molasses which is the subject of this suit. Thence he sailed with the molasses to the island of St. Thomas, where he received two letters from Gordon, informing him of Gordon's failure and directing him "to ship the cargo of the Enterprise to Peters, Pond, & Co. of Boston," and giving the form of a bill of lading for that purpose. The defendants had drawn a bill on Gordon for upwards of 2000 dollars which he owed them, and this bill had been refused acceptance, though intelligence of the refusal had not reached the defendants. Upon learning the failure of Gordon, they demanded payment of their debt of Merrill, and proposed to purchase the molasses and to pay him therefor, deducting their debt from the price. Merrill not assenting to this, they represented to him, that they should take measures, by detaining the vessel or otherwise, to compel payment. He 497
thereupon sold the molasses to them, at an agreed price, and received the balance (2000 dollars), after deducting the debt (2,139 dollars, 49 cents), and took a discharge of the debt for Gordon. This balance was paid over by Merrill to an agent of Gordon, and was appropriated for disbursements of other vessels belonging to him, but which also had been assigned to

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the plaintiffs for security for advances; so that the plaintiffs had the benefit of those disbursements. Merrill gave bills of lading of the molasses to the defendants, and agreed to carry it for them to New York at a stipulated freight. He sailed accordingly, and was driven by stress of weather into St. Domingo; and there the vessel was lost, and the cargo sold for the benefit of the underwriters. Merrill deposed that he was the brother-in-law of Gordon, and that he had sailed with such general instructions five voyages before. It appeared also, that on those voyages he traded according to his discretion for the account of his owner, until he obtained a cargo with which he was willing to return home, and that Gordon was satisfied with his conduct. Merrill further stated, that there was an understanding between Gordon and himself, that he might dispose of so much of the cargo as would sell at Point Petre, and ship the proceeds to Portland, and then go to St. Domingo, there to sell the rest of the outward cargo, and ship the proceeds to the United States; and that he should then go into the freighting business among the islands; that the principal object was freight; that in former voyages he had carried on freighting business between St. Domingo and St. Thomas; and that when he sailed on this voyage, it was supposed that similar business would be alike advantageous. He said, that as he had no opportunity to ship the proceeds of his outward cargo to the United States, he felt authorized to sell them to any person, with a view to the freighting business. The defendants did not see the original instructions or letters to Merrill, nor make inquiry concerning the extent of his authority; neither did he inform them concerning the same; but they must have known that the molasses was taken
498 on board as return cargo. The plaintiffs, on the 4th of December, 1822, wrote to the defendants, complaining of Merrill's having paid them 2,139 dollars, part of the proceeds of the cargo of the Enterprise, saying that the cargo belonged to themselves, and that the money was paid wrongfully, and claiming to have it repaid. The plaintiffs also brought an action of *assumpsit* against the defendants to recover that same sum, but it was discontinued before the commencement of the present suit.

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By direction of the Chief Justice, who tried the cause, a verdict was returned for the plaintiffs, subject to the opinion of the whole Court on the foregoing facts.

March 14th and 15th.

Prescott and *F. Dexter*, for the defendants, contended that the indorsement and delivery of the bill of lading, did not, under the circumstances, transfer the property to the plaintiffs, nor give them any lien upon it. There was no pledge, because no possession was taken. *Portland Bank* v. *Stubbs*, 6 Mass. R. 422. Merrill was the consignee, and he alone could transfer the property by an indorsement and delivery of the bill of lading. But such an indorsement and delivery constitute a transfer, only where the property is at sea. *Buffington* v *Curtis*, 15 Mass. R. 528; *Caldwell* v. *Ball*, 1 T. R. 216; *Lempriere* v. *Pasley*, 2 T. R. 490; *Gardner* v. *Howland*, 2 Pick. 604; *Lanfear* v. *Sumner*, 17 Mass. R. 110. The parties have dated the indorsement the 11th of May, when the property was here. The agreement was then made, and the ceremony of putting it in writing afterwards can have no effect in dispensing with the necessity of possession. The plaintiffs permit the property to go to sea without notice to the master of the transfer, thus enabling him to sell to persons who are alike ignorant of that fact. The assignment was intended as a secret lien, and it was fraudulent as against creditors or purchasers. The defendants stand in both those relations.

But admitting the transfer to be valid, the master, being ignorant of it, had a right to make the sale, and it is binding on Gordon and on the plaintiffs. He was the general agent of Gordon, and was acting in the matter of his agency. Paley on Princip. and Ag. 139, 145; *Fenn* v. *Harrison*, 3 T. R. 760. He was bound only to exercise good faith, and he acted both with good faith and with good judgment, in not subjecting the property to the restraint of legal process; and his conduct, under the extraordinary circumstances, should receive a liberal construction. *Lyle* v. *Clason*, 1 Caines's R. 342; *Drummond* v. *Wood*, 2 Caines's R. 310; *The Gratitudine*, 3 Rob. Adm. R. 211. The letters received by him did not amount to a revocation of his authority, and if they did, the defendants, being ignorant of their contents, would not be affected by the revocation. It is true, that they had heard of Gordon's failure;

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but that was not a revocation, we having no bankrupt law. They knew that his authority was general, and they were not obliged to look any further. A general agent binds his principal, even if he exceeds his authority.

It appears from the evidence in the case, that after Merrill returned home, Gordon acquiesced in the sale; and this, without an express approval, is a sufficient ratification by him *Prince* v. *Clark*, 1 Barn. & Cressw. 186.

But what is of more importance, the plaintiffs themselves have so far ratified the doings of the master, that they cannot maintain this action. They have had the benefit of part of the proceeds of the sale, and with a knowledge of all the facts, they have claimed in their letter only the balance. Bringing the action of *assumpsit* was also a ratification, and a waiver of the tort. The assent for a moment was sufficient, and the discontinuing of the action could not affect the previous ratification. *Hunter* v. *Prinsep*, 10 East, 390. The adoption of an agency in part, is an adoption of it in the whole. Paley, 145, 146.

It will be said, that although Merrill might perhaps sell the property, in order to go into the freighting business, he could not do so for the purpose of paying a debt. The answer is, that the sale would not be void, but the principal would have his remedy against the agent. *Scott* v. *Surman*, Willes, 400

Gorham and *Bliss*, for the plaintiffs, cited authorities to the following points:— that where an agent makes an unauthor-
500 ized sale, the owner may have trover, *Wilkinson* v. *King*, 2 Campb. 335; *Baring* v. *Corrie*, 2 Barn. & Ald. 137; *M'Combie* v. *Davies*, 6 East, 538; *S. C.* 7 East, 7; — that the purchaser must examine into the power of the agent, *De Bouchout* v. *Goldsmid*, 5 Ves. 213; *Newsom* v. *Thornton*, 6 East, 17, 43; *Baring* v. *Corrie*, 2 Barn. & Ald. 149; *Martini* v. *Coles*, 1 Maule & Selw. 140; — that the transfer was valid, and that it was a mortgage rather than a pledge, *Lickbarrow* v. *Mason*, 6 East, 20, note; *Portland Bank* v. *Stacey*, 4 Mass. R. 661; *Gardner* v. *Howland*, 2 Pick. 599; *Bartlett* v. *Williams*, 1 Pick. 295; *Robinson* v. *M'Donnell*, 2 Barn. & Ald. 134; *Kelly* v. *Munson*, 7 Mass. R. 319; *Robinson* v. *United Ins. Co.* 1 Johns. R. 593; *Edwards* v.

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Harben, 2 T. R. 587; *Hibbert* v. *Carter*, 1 T. R. 745; *Estwick* v. *Caillaud*, 5 T. R. 420; *Barrow* v. *Paxton*, 5 Johns. R. 258; — and that commencing the action of *assumpsit* was not a ratification, *Hambly* v. *Trott*, Cowp. 371; *Smith* v. *Hodson*, 4 T. R. 211; *Lepping* v. *Kedgewin*, 1 Mod. 207, *Field* v. *Jellicus*, 3 Lev. 124; *Cummings* v. *Noyes*, 10 Mass. R. 436; Paley, 262, 263.

Jan. 13th, 1827.

PUTNAM J. delivered the opinion of the Court. This is a contest between the creditors of an insolvent debtor; the plaintiffs claiming in virtue of an assignment by the debtor himself, and the defendants claiming under a sale of an agent of the debtor.

It is objected for the defendants, that the plaintiffs have proved no title to the outward cargo; — that the indorsement on the bill of lading was made when the vessel and cargo were at home, and possession might then have been taken, but that no possession was ever taken.

If, however, the transfer was not perfected by a delivery before the vessel sailed, it might be made when the vessel was at sea, and the delivery of the bill of lading with the assignment upon it would be valid as between the parties, and against strangers who did not acquire a legal title without notice of the assignment.[1]

It has been suggested, that the assignment to the plaintiffs was fraudulent as against creditors. But we do not perceive any facts in the case which warrant the suggestion. There is no reason to doubt that the plaintiffs did make the advances, 501
and that the assignment was intended to operate in the nature of a mortgage for their security.[1] They were accountable to Gordon or his assigns for the surplus.

So that we are brought to the consideration of the title of the defendants. It is admitted that they could not have been informed of the dishonor of their bill, when they threatened to detain the vessel on account of their claim against Gordon. But nevertheless, Gordon was justly indebted to them for

[1] See *Parsons* v. *Dickinson*, 11 Pick. 352; *Ingraham* v. *Wheeler*, 6 Connect. R. 284, 15 Mass. R. (Rand's ed.) 533, n. (*b*).

[1] See *Parks* v. *Hall*, 2 Pick. (2nd ed.) 206, and notes to that case; *Gordon* v. *Mass. F. & M. Ins. Co* 2 Pick. 249.

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advances they had made for him, and we consider them as honest creditors. They knew that Gordon had failed, and they had a right to use any lawful process for the recovery of their debt.

But these considerations do not touch the authority of the master to dispose of this return cargo. What was the extent of his authority? He was, by the written orders, to prosecute the voyage according as he should think best for his owner. What voyage was intended? Unquestionably to the West Indies, to sell his outward cargo and to bring home the proceeds in a return cargo. These instructions, although somewhat general, must be confined to those objects, and would not authorize the master to go into a course of speculation, not with a view to a return cargo, which he might think would ultimately be advantageous to his owner. So Gordon says he understood them; he thought that the proceeds of the outward cargo were not to be disposed of in the West Indies, but that they would be brought home. He says also, indeed, that if the master had, in the exercise of his best discretion, sold them there, he should have assented to it. He might have done so from various motives; — from motives of interest, or of compassion, or of friendship. But the question now under consideration is, if the master had authority to bind his owner or his assigns, whether willing or unwilling to ratify the sale.

It appears that on some former voyages Merrill had traded for the account of his owner; that he had sold wine which he had received in part for his outward cargo, for something to be brought home as return cargo; and it has been contended that he was the general agent, and acting according to his best judgment; that the defendants were ignorant of
502 the instructions which had been given him; and we are referred to *Fenn* v. *Harrison*, 3 T. R. 760, where the authority of factors is much discussed. Harrison had sent F H. to sell a bill of exchange, informing him that he would not indorse it, nor in any way become liable upon it; but F. H. told the person who bought the bill, that as the number of Harrison's house was upon the bill, he would be just as much liable as if he had indorsed it. And Lord *Kenyon* was of

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opinion that Harrison was liable in consequence of the unauthorized representation of his agent; but the other judges, *Ashhurst*, *Buller*, and *Grose*, were clearly of a contrary opinion, on the ground that F. H. was not a general agent, but commissioned for a particular purpose.

The general agency may be inferred from the great number of instances in which the agent has acted in the manner as in the case under consideration; and the particular agency is limited to the single transaction.

The original commission in the case at bar was for a particular purpose, namely, to make what is called a West India voyage, according to the master's best discretion. So long as his means were intended and directed accordingly, the owner would be bound, his instructions being general and the means resorted to being within the scope of his authority; but if he should depart from the object of the commission, and instead of making the voyage, should undertake other objects not originally contemplated, it should seem clear, that his owner would not be obliged to confirm his act.[1]

But we think the letter from Gordon, directing the cargo to be sent to the plaintiffs, should be considered as if the purport of it had been originally stated in the orders, because that letter was in Merrill's hands before he sold the molasses to the defendants. So far, therefore, as this case concerned the owner and the master, there was a direct violation of orders.

It is said for the defendants, that they knew nothing of the private instructions which Gordon had given to the master, and should therefore not be prejudiced by them. But the 503
defendants did not make any inquiries as to the extent of his authority. They preferred trusting to the general power usually given to masters of vessels, rather than to such power as upon inquiry it might appear that this master had in fact been invested with. They had a right to know the extent of his commission. If they had inquired, and Merrill had shown them the original orders, and the subsequent instructions to

[1] See *Thompson* v. *Stewart*, 3 Connect. R. 171; *Parsons* v. *Armor*, 3 Peters, 423; *Rossiter* v. *Rossiter*, 8 Wendell, 494; *Brydon* v. *Taylor*, 2 Harr. & Johns. 396

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send the property to the plaintiffs, it is hardly to be supposed that they would have considered a sale to them as within those instructions.[1]

But the master swears that the freighting business among the islands was the principal object, and that he of course must have had authority to sell the return cargo, if he could not ship it, and that he could not find any opportunity to ship it. If this verbal understanding should be considered as valid between the owner and master, it is evident that the letter which directed the master to send the property to the plaintiffs, must have been a revocation of the project of freighting. But if there had not been any such revocation, the facts do not warrant the sale upon that basis. It was not made with the intent to employ the vessel in freighting among the islands, but because of the importunity of the defendants, and the difficulty, delay, and expense, which the master feared would take place, if he did not comply with their request to pay their claim against Gordon. Surely Gordon had a right to be consulted upon that matter before his property should be so appropriated. It can hardly be supposed, that the orders to a master to perform a voyage in the best way he can, will constitute him the judge for the owner in regard to claims against him, and the mode of satisfying them.

It is argued, however, that if the master had no authority to pay this debt, the owner must seek his remedy against him, but that the sale is good. However that might have been, if the sale had been made in the usual course of business, it is to be remarked, that this was an extraordinary transaction, and calling for a full and particular authority, and not a common transaction, like, for example, the sale of the outward cargo, which would be within the general scope of the commission given to the master.

604 If Gordon had not transferred this property to the plaintiffs, he might have ratified this conduct of his master; but the plaintiffs may insist upon their legal rights, as his assignees, and if he would not have been bound, the assignees are not to be bound.

[1] See *Schimmelpennick* v. *Bayard*, 1 Peters, 290.

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Some reliance is placed by the counsel for the defendants, on the fact, that in former voyages Merrill traded according to his discretion for the account of his owner, selling some merchandise he had bought with his outward cargoes for other goods, and that his instructions on this voyage were similar to those given on former voyages, and that his conduct was approved; — so that there was a practical construction of his authority as extending to the sale of such part of his return cargoes as he should think for his owner's interest. But this trading in the other voyages was *with a view ultimately to a return cargo*. He had never in any former voyage disposed of his return cargo abroad, but had brought or sent it home.

This case has none of the hard features of the case of *M'Combie* v. *Davies*, 6 East, 540, where the plaintiff recovered for the tobacco which a broker bought in his own name for the plaintiff, but pledged it to the defendant, who supposed it to be the property of the broker. In the case at bar, the defendants trusted to the personal responsibility of Gordon, not to this property. But the plaintiffs relied originally upon this cargo for their security, and procured insurance to be made upon it immediately after the vessel sailed.

It has been argued, that the sale to the defendants has been ratified by Gordon, and by the plaintiffs also. But we do not perceive any thing in the language or conduct of either, which could amount to a ratification. Gordon swears that, on the contrary, he expressed his dissatisfaction to Merrill in pretty strong terms.[1]

In regard to the supposed ratification of the plaintiffs, it is contended that they have received the benefit of the 2000 dollars paid by the defendants in cash, and that in their letter to the defendants they claim only *a balance*, to wit, the money paid for the debt of Gordon; and that they sued the defendants 505
in *assumpsit for the balance*, and so have confirmed the sale, and chosen to look to the defendants merely for part of the proceeds.

[1] A principal, who neglects promptly to disavow an act of his agent who has transcended his authority, makes the act his own. *Bredin* v. *Dubarry*, 4 Serg. & Rawle, 27. See *Richmond Man. Co.* v. *Starks*, 4 Mason, 296.

Implied ratifications, however, extend only to such acts of the agent as are known to the principal at the time. *Thorndike* v. *Godfrey*, 3 Greenl. 429.

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It is true, that the adopting of the acts of an agent in part, is to be considered as the ratification of them in the whole. As in *Wilson* v. *Poulter*, Str. 859, where the assignees of a bankrupt seized a number of South-sea and India bonds, which his agent had bought after his bankruptcy, and brought an action against the agent for the money with which others were purchased; and it was held, that the accepting of some of the bonds was an affirmance of the act of the agent in laying out the money for them. See the cases upon this point cited in Paley, *pt.* 1, § 2. But in the case at bar, the money appropriated towards the disbursements of the vessels of the plaintiffs, was applied to their use without their knowledge. If they had received the money of Merrill and had so applied it, the case would have been quite different from the present But they had no election in the matter. The money was paid without their consent, and all that could be required of them would be to account for what had been so expended, upon recovering the value of their property wrongfully delivered to the defendants.

And in regard to their letter, it seems to us to be consisten with these views. It is dated December 4th, 1822. It complains of Merrill's having paid to the defendants 2139 dollars 49 cents, part of the proceeds of the cargo of the Enterprise, which cargo belonged to the plaintiffs; and they say that sum was paid wrongfully, and claim to have it repaid. Now it seems to us, that it would be a harsh construction of this letter, to consider it as a ratification of the sale of the property by Merrill. It appears rather to mean, that they were willing to make no further claim for damages than for that balance, as they had received the benefit of the disbursements. But this proposal was rejected, and the parties resorted to their legal rights.

And in regard to the action which the plaintiffs sued against the defendants in *assumpsit* for the proceeds — if it had been
506 relied upon, it would have been a ratification of the sale. The case cited of *Smith* v. *Hodson*, 4 T. R. 216, is strongly to that point. But the plaintiffs discovered before trial, that they had misconceived their remedy, and they discontinued their suit. We cannot think that these facts, separately or collectively, amount to a ratification of the sale.

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The opinion of all the Court is, that the plaintiffs shall recover. But the action is to stand continued for judgment, to enable the defendants to obtain their judgment against the plaintiffs for the money which has been paid for their benefit upon a contract which has failed, unless the plaintiffs shall allow that sum on account of this verdict.

Note. The plaintiffs accordingly agreed to allow it, with interest from the time when it was paid by the defendants.

Charles W. Thayer, Petitioner for *Certiorari*, *versus* William R. Stacy.

A member of a volunteer company raised within the limits of the brigade within whose limits he resides, is required to produce to the commanding officer of the standing company within whose limits he resides, a certificate, pursuant to *St.* 1825, *c.* 153, § 4, that he does active duty in such volunteer company, and keeps himself properly armed, equipped, and uniformed.[1]

The question was, whether a person, who is duly enlisted in a volunteer company raised within the limits of the brigade within whose limits he resides, is obliged to produce to the commanding officer of the standing company within whose limits he resides, a certificate pursuant to the 4th section of *St.* 1825, *c.* 153; which enacts, "that any non-commissioned officer or private of any company raised at large, by producing a certificate from the commanding officer of the company to which he belongs, that he does active duty in said company, and keeps himself properly armed, equipped, and uniformed, shall be exempted from all duty in the standing company within whose bounds he may reside."

Bartlett, in support of the petition. The power given to the commander-in-chief, by *St.* 1809, *c.* 108, § 2, to authorize the raising of volunteer companies, was restricted by the case of *Commonwealth* v. *Cummings*, 16 Mass. R. 194, to raising them within the limits of the brigades to which they should respectively belong. This section of the statute of 507

[1] See Revised Stat. *c.* 12, § 18.

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1825, was enacted for the purpose of allowing a volunteer company to be raised out of such limits, its members however being subjected to the condition of producing the certificate in question, and was not intended to have any operation on a volunteer company raised within the provisions of the former law. Those provisions can be annulled only by a statute which expressly repeals or revises them, or which is inconsistent with them. *Pease* v. *Whitney*, 5 Mass. R. 380; *Holbrook* v. *Holbrook*, 1 Pick. 254. This statute of 1825 is only additional.

W. H. Gardiner, for the respondent, said that the certificate was required of members of all volunteer companies without distinction; that the legislature designed that such companies should be well armed and disciplined; and that the object of this 4th section of *St.* 1825, *c.* 153, was to prevent men of property from enlisting in a volunteer company without any intention to perform military duty, but merely for the purpose of paying their fines to such company in preference to paying them to the standing company.

Jan. 13*th*, 1827.

PARKER C. J. delivered the opinion of the Court. It has been suggested, that the sole object of the legislature was to avoid the effect of the decision of this Court in the case of *Commonwealth* v. *Cummings*, by which it was virtually determined, that a member of a company raised at large must have his residence or domicile within the limits of the brigade within which the company is raised; but the words of the statute are inadequate for this purpose, nor do they necessarily, nor even probably, convey any such meaning. Without doubt, had it been the intention of the legislature to authorize enlistments into volunteer companies in a manner determined by the Court to be contrary to the meaning of existing statutes, an explicit provision would have been made for that purpose.

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We can consider the 4th section of *St.* 1825, *c.* 153, in no other light, than as providing for the evidence on which one claiming to belong to a volunteer company, is to be exempt from duty in the standing company of militia, no such evidence having been before required by any statute.

The provision is exceedingly loose and incomplete, for it does not appear when such certificate is to be produced,

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nor how long it is to be in force. But it was undoubtedly intended, that where any one should be enrolled in a standing company and notified of such enrolment, he should show by the certificate required by this statute, that he is not liable to such enrolment. The object of the legislature seems to have been, to require something beyond the mere enlistment in the volunteer company, to wit, that he should do actual duty therein when required, and keep himself armed, equipped, and uniformed as a member thereof.

Petitioner took nothing by his petition.

Ephraim Wales *versus* Thomas Belcher.

The provision in *St.* 1821, *c.* 109, § (6,) [see Revised Stat. *c.* 87, § 3,] that the justices of the Police Court of Boston shall, under the appellation of The Justices' Court for the County of Suffolk, have original, exclusive jurisdiction and cognizance of all civil suits and actions which before might have been heard and determined by any justice of the peace of that county, is not unconstitutional; neither as interfering with the power of the governor to appoint all judicial officers, nor as abridging the constitutional powers of justices of the peace, nor because it depended for its force upon the contingency of the acceptance by the inhabitants of Boston of the act establishing the city of Boston, nor because its application was not general to the justices of the peace in all the counties in the commonwealth.

This case came before the Court upon exceptions filed to an order of the Court of Common Pleas that the action should be dismissed.

Whiting, for the plaintiff, argued in support of the exceptions. *July 22d.*

Z. G. Whitman, for the defendant.

Parker C. J. delivered the opinion of the Court. This suit was commenced before a justice of the peace of the county of Suffolk, and was dismissed by the Court of Common Pleas, where it was entered on appeal from the justice, on the ground that the justice had no jurisdiction of the case, because by *St.* 1821, *c.* 109, § 6, [see Revised Stat. *c.* 87, § 3,] exclusive jurisdiction of all causes within the county of Suffolk theretofore cognizable by justices of the peace of the county, was given to the Justices' Court for the county of Suffolk, established by that statute. 509 *Jan.* 13th, 1827

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This order of the Court of Common Pleas is complained of by the plaintiff in the action, for several causes. First, because, as he alleges, the statute is in this respect not warranted by the constitutional power of the legislature, inasmuch as it declares and determines what persons shall compose the Justices' Court, instead of leaving their appointment to the executive branch of the government, which, by the constitution, has the right and the power to appoint and commission all judicial officers. But we think this objection rests upon a mistaken construction of the statute. By the 2d section of the same statute a Police Court is established within and for the city of Boston, with all criminal jurisdiction formerly belonging to justices of the peace within the county of Suffolk, except in relation to such offences as happen within the town of Chelsea, and this court is to be composed of three persons, who are to be appointed and commissioned by the governor pursuant to the constitution. The 6th section merely confers civil jurisdiction to a certain extent on the justices of the same court, giving such court another and distinct name when acting in this latter capacity; and we perceive no constitutional objection to this exercise of legislative authority, any more than to that by which heretofore criminal jurisdiction was vested in the Court of Common Pleas, upon the abolition of the Court of General Sessions of the Peace in the county of Suffolk. By the constitution, the legislature has all power to create courts and establish their jurisdiction, and the mode of exercising that power is a matter of legislative discretion. The
510 Justices' Court is by this statute appended to the Police Court, and their civil jurisdiction is to be exercised by the same persons, who are appointed and commissioned by the governor pursuant to the constitution, that is, with the advice and consent of the council.

Another objection is, that anterior to and at the adoption of the constitution, justices of the peace held and exercised jurisdiction by law over civil suits to a certain extent, and that the legislature could not constitutionally abridge, much less annul that jurisdiction. But there is no color for this objection. The office of justice of the peace is recognised by the constitution; but the power and jurisdiction of that office is

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nowhere in that instrument limited or defined. The legislature has the right to mould the jurisdiction of all courts at its will, so as not to infringe any other provision of that instrument. It may enlarge or diminish the power and duty of courts and magistrates. All this authority, if not expressly given to the legislature, as it is, would result from the very nature of legislative power. By virtue of this power the jurisdiction of Courts of Sessions and Common Pleas, both which existed before the constitution, have been changed, as the circumstances of the commonwealth required. Formerly it was an essential privilege of a justice of the peace to be a member of the Court of Sessions, but gradually the constitution of that court has been changed, and in particular the number of the justices has been limited to a few, specially commissioned for that purpose. Was it ever thought, that the rightful power of a justice of the peace has been unconstitutionally wrested from him by the legislature, because he can no longer make one of the Court of Sessions? This objection may as well be made to every alteration by the legislature, of the powers or duties of any of the courts since the adoption of the constitution; for it is founded upon the right of all courts in existence at that time, to the perpetual exercise of all the powers exercised by them antecedently to and at the adoption of that instrument Such a restriction upon the legislative power would have been found unwise and inconvenient if it had been expressed, and it surely ought not to be implied against all reasonable inferences of the probable intent of the people in forming the constitution.

Again, it is said that the law establishing the Justices' 511
Court is void, because by the last section it is made to depend upon the contingency of the acceptance by the inhabitants of the town of Boston, of the act which constituted that town a city. This objection, for aught we see, stands unsupported by any authority or sound argument. Why may not the legislature make the existence of any act depend upon the happening of any future event? Constitutions themselves are so made; the representative body in convention, or other form of assembly, fabricate the provisions, but they are nugatory, unless at some future time they are accepted by the

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people. Statutes incorporating companies, are made to derive their force from the previous or subsequent assent of the bodies incorporated. A tribunal peculiar to some section of the commonwealth, may be thought by the legislature to be required for the public good, and yet may not be acceptable to the community over which it is established. We see no impropriety, certainly no unconstitutionality, in giving the people the opportunity to accept or reject such provisions.

Then again it is objected, that if the legislature have the power at all, it can be exercised only by a general law operating upon all justices of the peace in every county of the commonwealth alike; but to deny to the legislature this power, will be to declare the invalidity of other laws which have been long since enacted and practised upon without any question of their validity. Those establishing the Municipal Court for the city of Boston, and the Boston Court of Common Pleas, are of this description. It is true, that if those acts were passed without constitutional authority therefor by the legislature, they do not sanction the principle; for one usurpation cannot justify another; but the presumption is in favor of the validity of laws, which have gone through all the constitutional forms of legislation, and have been practised and adjudicated upon for a series of years. But there is really no reason why different tribunals should not be erected in different parts of the State, if local convenience requires them, provided
512 the rights of the citizen to a fair trial according to the principles of the constitution, are not invaded or impaired. In criminal matters it has been found highly expedient, and in civil actions for small demands, public convenience may require similar provisions.

Judgment affirmed.

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[1] See *Commonwealth* v. *Worcester*, *ante* 474, and note.

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BENJAMIN THOMPSON *et al. versus* JOSHUA HATCH and Trustees.

ee provision in St. 1782, c. 11, § 6, that pleas in abatement in the Court of Common Pleas shall be filed before the jury is empannelled, is no longer in force; and a rule of that court, that such pleas "may be filed at any time during the first four days of the return term, and not afterwards," is valid by virtue of St. 1820, c. 79, § 7.

So long as a rule of court remains unrepealed, it cannot be dispensed with in a particular case. Thus, where a plea in abatement, in consequence of misinformation from a judge of the Court of Common Pleas, was not offered until the *fifth* day of the term, and was then, by leave of the judge, filed as of the *fourth* day, the filing was held to be improper, being in contravention of the rule above recited.

The plaintiffs did not appeal from such decision of the judge, but demurred to the plea, assigning for cause, that it was filed too late; but this Court, notwithstanding the irregularity in bringing up the case, seeing upon the record produced that the plea was filed contrary to the standing rule of the court below, rejected such plea and awarded a *respondeas ouster*.

THIS action was entered in the Court of Common Pleas at January term 1826. On the 8th of February, it being the fifth day of the term, the defendant, Hatch, moved the Court, which was held by only one judge, for leave to file his plea in abatement as of the fourth day of the term; because the judge who presided on the 30th of January, the third day of the term, gave public notice to the suitors and their counsel generally, and to the counsel for Hatch in particular, that when he should adjourn the Court, he should adjourn it to the 8th of February; but in fact he adjourned it, without the knowledge of Hatch or his counsel, to the 2d of February, not for the purpose of proceeding with the business of the Court generally, but merely that another judge might preside on that day, and if he should judge it to be proper, might cause the defendants in an action in which the judge first mentioned was a party, to be defaulted, such action having stood open two terms and no appearance having been entered for the defendants. 5 3

THIS motion was granted, for the reason stated, and the plea was filed accordingly, as of the fourth day of the term.

The plaintiff afterward, on the same fifth day of the term, objected to the filing of the plea on that day; — first, because

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it was offered to be filed three days after the jury had been empannelled; secondly, because by the rules of the Court of Common Pleas, no plea in abatement can be filed after the fourth day of the term.

The plaintiff also demurred to the plea, and assigned for causes, that it was not filed until the fifth day of the term, nor until after the jury had been empannelled.

July 22nd. *Z. G. Whitman.* Perhaps the plaintiffs will be confined to their demurrer, but they now move the Court to reject the plea in abatement. The rule of the court below, which was made in 1824, is, "that pleas in abatement and demurrers to declarations may be filed at any time during the first four days of the return term, and not afterwards." This rule is repugnant to the provision in *St.* 1782, *c.* 11, § 6, that pleas in abatement shall be filed before the jury is empannelled; which provision is not repealed, for subsequently to the passing of *St.* 1811, *c.* 33, § 5, which enacts, that the justices of the Circuit Court of Common Pleas may establish such rules for filing pleas in abatement, as they may see fit, provided the same are not repugnant to the laws of the commonwealth, — and of *St.* 1813, *c.* 173, § 3, which enacts, that the judge of the Boston Court of Common Pleas shall have power to make any orders for the regular administration of justice in the same, as shall not be inconsistent with the laws of the commonwealth, — this Court, in *Jacobs* v. *Mellen*, 14 Mass. R. 134, say, that "the defendant, if he pleads in abatement, must by our statute file his plea at the first term, and before the jury is empannelled." The *St.* 1820, *c.* 79, establishing the present Court of Common Pleas, repeals the statutes of 1811 and 1813, but says nothing of that of 1782, and the only authority, if any, for making this rule, is a clause in the 7th section of the statute of 1820, similar to the one above mentioned in the statute of 1811. The rule is to operate throughout the commonwealth, but in some counties where the court does not sit four days, its application must be, to say the least, extremely inconvenient. But admitting the validity of the rule, a single judge had no authority to dispense with its obligation in this particular case.

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W. P. Mason. contrà, contended that the plaintiff ought to

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have appealed from the decision granting leave to file the plea, and that he could not take advantage of his objection upon this irregular demurrer, in which the cause assigned for demurrer is a new issuable fact, not appearing in the previous pleadings. If this rule of court cannot be sustained, another rule allowing actions to be entered after the first day of the term, must fall with it, being equally repugnant to *St.* 1782, *c.* 11, § 6. But that statute is repealed, and it is so considered in the late edition of the statutes. If then the Court of Common Pleas had power to make the rule, they had power to dispense with it in furtherance of justice. The remark of this Court in *Jacobs* v. *Mellen* was made through inadvertence.

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PARKER C. J. delivered the opinion of the Court. We have considered whether the rule of the Court of Common Pleas allowing four days for filing pleas in abatement and demurrers to declarations, notwithstanding the jury may have been previously empannelled, is valid; for if they had not the right to make such a rule, the proceedings in this case would be irregular, and the plaintiff would have remedy, either by writ of error, or in some other way.

As, by *St.* 1782, *c.* 11, it is expressly enacted, that all actions shall be entered the first day of the term, and all pleas in abatement and demurrers to declarations shall be filed before the jury is empannelled, it is clear that a rule providing for the filing of pleas &c., any time after the jury is empannelled, would be void, unless that statute is expressly or by clear implication repealed. It was repealed by *St.* 1811, *c.* 33; 515
though not in express terms, yet by the establishment of another court of common pleas, to which all the jurisdiction of the court under the statute of 1782 was transferred. By this statute of 1811, power was given to the justices of the Circuit Court of Common Pleas, to establish all such rules for filing pleas in abatement and demurrers to declarations, and for the orderly and well conducting of business, as they might see fit, provided the same were not repugnant to the laws of the commonwealth. But for this proviso, without doubt the statute of 1782 in relation to pleas in abatement would have been repealed, because the power given in the enacting clause

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of this section is wholly inconsistent with the limitations of the statute of 1782; and if this proviso should be construed to preserve in force the former rule respecting the filing of pleas, &c., the whole of this power given to the court by the statute of 1811 would be nugatory; for the amount of the whole would be, that the justices of the court should have power to establish rules for the filing of pleas, &c., provided that they shall be filed before the jury is empannelled:—which we think could not be intended, but that the object of the proviso was to prevent the establishing of any rules on this subject, which should be repugnant to the general laws of the land in regard to the fair and impartial administration of justice.

This statute of 1811 is however repealed expressly by *St.* 1820, *c.* 79, and the effect of this repeal, if that were the only purpose of the statute, would be to revive the statute of 1782. But this statute of 1820 vests all the powers of the Court of Common Pleas in the court which it establishes. And in the 7th section the same power is given to the justices to make rules in regard to the entry of actions, filing pleas, &c., as was given to the Circuit Court of Common Pleas, by the statute of 1811. We consider it to have been manifestly the intention of the legislature, instead of fixing by law the term for these proceedings, as was done by the statute of 1782, to commit to the court the power to establish rules upon this subject, because the justices would be better able than the legislature, to determine what would be most fit and convenient to the public.[1]

516 The observation of this Court in the case of *Jacobs* v. *Mellen*, 14 Mass. R. 134, was inadvertent; the point was not material to the case, and it is very likely that the rule of the Court of Common Pleas and the statute authorizing them to make rules, were not suggested.

But a rule of the court thus authorized and made, has the force of law, and is binding upon the court, as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. In the case before us, the plea was allowed to be filed on the fifth day of the term,

[1] See Revised Stat. *c.* 82, § 37; Howe's Pract. 214

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although the rule allows but four days for that purpose. The circumstances were such as would justify that order of the court, if it had had power to pass it; but we are satisfied that no one judge of the Court of Common Pleas, or of this Court, has authority to dispense with rules deliberately made and promulgated, on account of the hardship of any particular case, any more than he would have authority to dispense with any requisition of the legislature itself. The courts may rescind or repeal their rules. without doubt, or in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification, must be applied to all cases which come within it, until it is repealed by the authority which made it.

Disregarding therefore the form in which the question has been presented to us, seeing upon the record which is brought before us as by appeal, that the plea was filed contrary to the standing rule of the court, we now reject it, and the parties are held to plead to the merits.

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SUPPLEMENT.

OPINION of the Justices of the Supreme Judicial Court on Questions submitted to their Consideration by the House of Representatives.

A member of the House of Representatives can, constitutionally, be elected to a seat in the Council.

The constitution allows the filling of a vacancy in the House of Representatives, which has been occasioned by the election of one of its members into the Senate or Council.

THE Justices of the Supreme Judicial Court have attended to the questions to which, by a vote of the House of Representatives, passed 17th June, 1826, their answer was required, and submit the following as their opinion thereon.

The first question is, whether any vacancies can be filled in the House of Representatives, except such as are enumerated in the second article of the sixth chapter of the constitution:

The second, whether any member of the House of Representatives can be, constitutionally, elected to the Council board.

We take the liberty to transpose the order of the questions, since the answer to the second involves some considerations which are of importance in the consideration of the first.

And we are of opinion, that there is nothing in the constitution which disqualifies, or renders ineligible, a member of the House, for a seat in the Council.

518 The second article of *sect.* 3, *ch.* 2, of the constitution,

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provides for the choice of nine counsellors from the persons returned for counsellors and senators, with this further provision, that "in case there shall not be found upon the first choice, the whole number of nine persons who will accept a seat in the Council, the deficiency shall be made up by the electors aforesaid, *from among the people at large.*"

We think the framers of the constitution, and the people who adopted it, intended only by this provision to exclude the implication, that successive elections should of necessity be made from the Senate; which implication might have existed without this provision, since, by the constitution, the members of that board are all chosen by the people, counsellors as well as senators.

Members of either branch of the legislature continue to be of the people; for they have no distinct privileges, but only a trust or duty to perform for the people: and therefore, when it is provided that the second choice shall be from among the people at large, we think all citizens are comprehended within that description, who are not disqualified by the constitution to hold a seat in the Council; and that the real intent was, to leave the choice entirely unrestricted, after an attempt should have been made to fill up the Council from the Senate.

Such, we believe, has been the practical construction of the constitution in this particular; for it appears from the journals in the secretary's office, that in the very first year after it went into operation, a member of the House of Representatives was elected a counsellor, and took his seat at that board; and that many such elections were made between that time and the year 1823.

Cotemporaneous expositions of doubtful provisions, in all instruments, and particularly in legislative enactments and constitutional charters, are held to be legitimate and useful sources of construction.

What has been done in the beginning, and has continued to be done for a long series of years, without any question as to the rightful power or authority on which such acts have been grounded, may be presumed by succeeding public agents 519
to have been rightfully and properly done, in case no private right or public immunity is invaded.

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We therefore do not hesitate to give our opinion, that a member of the House of Representatives can, constitutionally, be elected to the Council board.

In regard to the other question, viz. whether any vacancies can be filled in the House of Representatives, except such as are enumerated in the second article of the sixth chapter of the constitution, we answer, that what we understand to have been the practice, viz. to fill vacancies made by the election of a member of the House to a seat in the Senate or the Council, may well be supported by the principles of the constitution, and by analogy to certain cases provided for by that instrument.

It was evidently the intent of the framers of the constitution, to recognise the right of towns, whose representatives had been called by the constituted authorities to the exercise of some other public duty inconsistent with their legislative functions, to supply their place by a new election; as will appear by the numerous cases provided for in the article of the constitution cited in the question proposed. It was probably not contemplated, that seats would be vacated by a legislative election to another department of the government, and therefore that case is not provided for.

But it is to be considered, that every town, having the number of polls required by the constitution, has a right to be represented in the popular branch of the legislature, and that this is a valuable and important right, of which the inhabitants ought not to be deprived without their own consent. In the case supposed, the inhabitants of the town have signified their intent and desire to avail themselves of this right, by the actual election of a member. In addition to the common interest which they have in the general concerns of the State, in the management of which they are entitled to a voice, they may have important local interests, which, in their opinion, require the special care and attention of one of their own body. Now, if by the removal of their representative into the Senate
520 or the Council, they must remain unrepresented, they are virtually disfranchised for the current year; and this, by the two branches of the legislature, who, if they have not imposed a

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duty, have offered strong inducements to the representative of the town to forsake the place to which he had been elected with a view to the particular interests of the town, as well as the general interests of the public.

The case may be different where the seat shall be vacated by death, resignation, or removal out of the State; for these are contingencies of which towns may be supposed to take the risk, when they make their election. Our opinion is confined to the case of a seat vacated by the interference of the constituted authorities, who have called the representative to another sphere of public duty; and in such case, we think his place may be supplied by the town he represented, because they would otherwise be deprived of their voice in the legislative department, without their consent, and this would be contrary to one of the fundamental principles of a free representative government.

We think, therefore, that what we understand to have been the settled practice of the House in similar cases, is founded upon a just view of the principles of the constitution, and upon analogy to the cases for which express provision has been made; it appearing from these cases, that whenever a representative has been called to the exercise of any public trust which disqualifies him for a seat in the House, the framers of the constitution, and the people, thought the town which he represented ought not thereby to lose its voice in the legislative councils.

We ask leave further to suggest, that as every town has, originally, a right to decline being represented, subject to the power of the House to impose a fine for their neglect; so this right would remain, when called upon by a precept from the House, requiring them to make a new election; for this precept cannot be of greater force than the constitution, which, according to decisions heretofore made, leaves the option to the towns, to be represented or not, on the condition above stated.

For the foregoing reasons, we are of opinion that vacancies 521
in the House of Representatives, other than such as are enumerated in the second article of the sixth chapter of the con-

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stitution, being of the kind supposed in the preceding remarks may be filled by new elections.

All which is respectfully submitted.

ISAAC PARKER.
SAMUEL PUTNAM
S. S. WILDE.
MARCUS MORTON

PLYMOUTH, MAY TERM 1792.

SAMUEL THATCHER *versus* THOMAS OMANS *et al.**

Husband and wife being seised in fee of land in her right, in consideration of the marriage and of twenty shillings, by deed acknowledged and recorded, "gave, granted, bargained, sold, enfeoffed, and conveyed" the same to J. S. in fee, to the use of the husband and wife, their heirs and assigns, and the heirs and assigns, of the longest liver of them. *Held*, that the deed should be taken, not as a bargain and sale or covenant to stand seised to uses, whereby there would be a use upon a use, but as a feoffment to uses; so that J. S. stood seised to the use limited in the deed, and then the statute of uses executed the use, thereby making the husband and wife complete owners of the land as joint tenants in fee.

IN this action Thatcher demanded against Omans and George B. Nye possession of one undivided seventh part of a tract of land in Rochester; alleging that Sarah Gill, wife of Moses Gill, on the 1st of August, 1771, was seised in fee of the premises, and that on the 3d of August she died so seised, without issue, and the right descended to the demandant, and that the tenants entered, &c. Moses Gill was admitted to defend, and he and the tenants pleaded that the tenants were not guilty of the disseisin complained of, and thereupon issue was joined. The jury found a special verdict, stating that on
622 the 4th of December, 1775, Sarah Gill, wife of Moses Gill, was seised in fee simple; that on the same day Moses and Sarah being seised in fee in her right, and being of full

* See a report of this case in 4 Dane's Abr. 257.

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age, made and executed the deed hereafter mentioned, to one Jonn Scott, for the considerations therein expressed, which deed was thereupon duly acknowledged and recorded; that Sarah died on the 5th of August, 1771, having never had issue, and that the demandant was one of her heirs at law; but whether, &c.

Parsons and *Davis*, for the demandant.

Sullivan and *Lincoln*, for the tenants.

DANA C. J.* In this case the only question submitted by the special verdict to the consideration of the Court, is, whether the demanded premises descended to the next of kin and heirs at law of Sarah, the late wife of Moses Gill. If so, the jury find the appellees guilty; otherwise, not guilty.

The decision of this question depends wholly upon the effect of the deed referred to by the verdict, whereby Moses Gill and the said Sarah, in consideration of the marriage heretofore solemnized between them, and for the settlement of the messuages, lands, tenements, and hereditaments, whereof they, in her right, were seised in fee, (among which were the demanded premises,) and also for and in consideration of twenty shillings to them paid by John Scott, did give, grant, bargain, sell, enfeoff, and convey to the said John Scott all the said messuages &c., to have and to hold all and singular the aforegranted messuages &c., to him the said John Scott and his heirs, *to the use and behoof of them the said Moses Gill and Sarah his wife and their heirs and assigns for ever, and the heirs and assigns of the longest liver of them, and to no other use or purpose whatever.*

The verdict finds the deed to have been duly made, acknowledged, and recorded.

As there is no precedent of any adjudication in a similar case to be found in any of our courts, and it would be vain to look elsewhere for them, and as this may become a leading case, I shall not content myself with merely declaring the 523
opinion I have deliberately formed, but will open and explain the grounds and principles of it. To this end, I will first

* The public are indebted to *Richard H. Dana*, Esq. for this opinion, which is copied from a manuscript of his father, the late Chief Justice *Dana*.

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state the several points which have been made in the case at the bar.

It is contended for the heirs at law of Sarah Gill,

1. That no estate passed from her in virtue of this deed, because being a feme covert, seised in her own right of the demanded premises, at common law she could convey by fine or recovery only, *where no consideration is necessary*.

2. That a feme covert being incapable of *receiving* any consideration, such conveyances of hers, wherein no consideration is necessary, are alone binding upon her.

3. That there is no usage of such a conveyance as the present one known in this country, so as to make it a common assurance.

4. Nor is it authorized here by any statutes. Hence,

5. That not being supported either by the common law of England, or by any usage or statute of our own, it can have no good foundation, and is therefore a mere nullity.

6. That the doctrine of uses is the same here as in England: it is void, therefore, because it creates a use upon a use, whether it be considered as a bargain and sale, or a covenant to stand seised to uses.

7. That if it should be considered as a covenant to stand seised to uses, it is void also, because a husband may covenant to stand seised of *his* estate to the use of his wife, but husband and wife cannot covenant to stand seised of the estate of *the wife* to the use of the husband.

On the other part it has been argued,

1. That if the husband and wife may convey *her* inheritance by fine or recovery in England, they may do so here *by deed only*, in virtue of the late province law, 9 *Will.* 3, c. 7.

2. That under this statute femes covert have always joined with their husbands in conveying *by deed* the real estates of which they have been seised in right of the wife.

3. That the deed in question having both a *valuable* consideration, viz. twenty shillings paid by Scott to Gill and his wife, and a *good* one, viz. marriage solemnized between them, is sufficient to raise a use, either by way of bargain and sale, or by covenant to stand seised to uses.

4. That as to the objection that the deed cannot *so* operate,

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because there cannot be a use upon a use, — if the use cannot take effect, the deed shall so far operate as to convey the fee to Scott; so that Sarah Gill did not die seised.

Although it be true, that by the common law of England a feme covert can convey her inheritance by fine or recovery only, yet this is not because no consideration is necessary in such conveyances, but because it is a principle of the common law, that conveyances or contracts of femes covert, except by some *matter of record*, are absolutely void. 2 Bl. Com. 293.

Hence a deed acknowledged by husband and wife, shall by the common law be enrolled only for the husband, and not for the wife, by reason of the coverture; and though it be enrolled for both, it bindeth her not. 2 Inst. 673.

But if the reason why a feme covert might convey her inheritance by fine or recovery, was, because no consideration is necessary therein, upon the same principle she might have conveyed by feoffment, where likewise no consideration is necessary.

Though it is said, a deed made *without consideration* is, as it were, of no effect, for it shall be construed to enure only to the use of the grantor himself; Noy's Tenures, 6; Co. Lit. 23 *a*; and equity will presume it so meant; yet if a feoffment be made without any consideration, and it is expressly declared to be to the use of *another*, nothing shall be presumed to the contrary. Which shows such a feoffment without consideration would be good to raise a use. 2 Bl. Com. 296, 330.

But *Holt*, in the case of *Shortridge* v. *Lamplugh*, says, "It would be hard judges should construe *such* a feoffment to the use of the feoffor, where it does not so appear; and they must be intended to be made to the use of the feoffee; especially since the *St.* 27 *H.* 8; for now if a feoffment should not be intended to be to the use of the feoffee, it would be 525
vain and to no purpose. 2 Ld. Raym. 801; *S. C.* 3 Salk. 367. The reason is plain, because the statute would unite the legal estate and the use in the feoffor, and place it exactly where it was before.

Further, to say that a feme covert can convey only by fine or recovery, because she is *incapable* of *receiving* any

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consideration, would be to destroy the general mode of conveying their inheritances, viz. by joining with the husband in making a deed of them to a third person: which has become the most common assurance for transferring the inheritances of femes covert in this country; and for that reason not now to be shaken, any more than their conveyances of them by fine or recovery in England. 2 Bl. Com. 339.

The mode of transferring the inheritances of femes covert by husband and wife, *by deed only*, is unknown to the common law of England, nor does it depend, perhaps, upon any usage of this country prior to the late province law of 9 *Will.* 3, *c.* 7, which enacts, "That henceforth all deeds or conveyances of any houses or lands, within this province, signed and sealed by the party or parties granting the same, *having good and lawful right or authority thereto*, and *acknowledged* by such grantor or grantors before a justice of the peace, and *recorded at length in the registry of the county* where such houses or lands do lie, *shall be valid to pass the same, without any other act or ceremony in the law whatsoever.*"

By the common law of England (which our ancestors brought with them, so far as it was applicable to their circumstances) no freehold estate in any corporeal hereditaments could be created or transferred, but by livery of seisin, — agreeably to the maxim, *Feudum sine investiturâ nullo modo constitui potuit*, — or by matter of record, viz. by fine or recovery. 2 Bl. Com. 311, 314, 348, 357.

This statute was evidently made to introduce a new mode of creating or transferring freehold estates in corporeal hereditaments, viz. by deed signed, sealed, *acknowledged* and *recorded*, as the statute mentions. It does not prescribe any particular kind of deeds or conveyances, but is general and extends to all kinds of conveyances. The words are, "all deeds or conveyances of any houses, &c., signed, &c., by the party granting the same, *having good and lawful right or authority thereto*," that is, having a good and lawful right to any houses, &c., and authority to convey the same, "*shall be valid to pass the same, without any other act or ceremony in the law whatsoever.*"

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It is to be considered, therefore, whether Moses Gill and

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his wife had, at the time of making the deed in question, good and lawful right to the demanded tenements, and authority to convey the same by *any* mode of conveyance whatever.

Their right and authority to convey the tenements is not denied, provided it had been done by jointly levying a fine or suffering a common recovery for the purpose; the mode only in which it has been done is objected to.

It is indeed said in one of the objections, that a husband may covenant to stand seised of *his* estate to the use of *his wife*; but that husband and wife cannot covenant to stand sejsed of the estate of *the wife* to the use of the husband. Suppose this to be true, and that a feme covert cannot at common law make any deed, yet I find forms of deeds wherein the husband covenants that he and his wife will levy a fine of the lands of the husband and wife or *either of them*, to enure to the use of the husband and wife, and *their heirs and assigns for ever* 2 Bridgm. Conv. 170. Which points out a mode of conveying her inheritance to her husband and herself as joint tenants.

This statute was passed in 1697, nearly a century ago, and I believe not a single instance can be found in this country wherein recourse has since, if ever, been had to a fine or recovery to transfer the inheritance of a feme covert; but to deed only, executed, acknowledged, and recorded as the act requires, and in the manner this is done, save only the form of the deed.

Nay, it is admitted also that husband and wife may, by their joint deed, in virtue of this statute, or at least by the usage of this country, convey her inheritance to a third person;[1] and if it is intended to be revested in them by a different 527

[1] See Revised Stat. *c.* 59, § 2; *Fowler* v. *Shearer*, 7 Mass. R. 14; *Colcord* v. *Swan*, 7 Mass. R. 291; *Dudley* v. *Sumner*, 5 Mass. R. 463; *Lithgow* v *Kavenagh*, 9 Mass. R. 161; *Durant* v. *Ritchie*, 4 Mason, 45; *Whiting* v *Stevens*, 4 Connect. R. 44; *Whitbeck* v. *Cook*, 15 Johns R. 483; *Gordon* v. *Haywood*, 2 N. Hamp. R. 402; *Elliot* v. *Sleeper*, 2 N. Hamp. R. 525.

In order to render the deed of land, held in right of the wife, effectual to pass the fee simple estate, it is not sufficient that she sign and seal the deed but she must also join her husband *as party to the conveyance*. *Payne* v. *Parker*, 1 Fairfield, 178. See *Lufkin* v. *Curtis*, 13 Mass. R. 223; *Catlin* v. *Ware*, 9 Mass. R. 218.

The wife will not be bound by any of the covenants contained in such joint

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tenure, that such third person may by another deed convey it back to them accordingly.

This has undoubtedly been the most frequent or customary method of effecting such a purpose.

But is it the safest, best, or only legal mode of doing it? I think it is neither. For laying aside the question, whether two deeds made for the sole purpose of effecting *one* design, ought not to be considered as *one* instrument, and if so, they must rest upon the same principle as the present deed, many inconveniences might spring out of this mode of two deeds, which might wholly prevent the design of the parties from taking effect. The feoffee might convey the lands to others; they would be subject to be attached for his debts; he might die before a second deed could be executed, when the tenements would descend to his heirs; and his wife, if he had one, would be dowable of them, if she should refuse to release her dower in the second deed.

All which hazards are avoided by this mode of conveyance by one deed to uses; whereby the husband and wife convey her estate, not to themselves, as has been said, but to a third person, for the real uses intended; who stands seised thereof accordingly; the statute of uses annexes the estate to the use, and so gives them a complete title. 2 Bl. Com. 333.

But it is further objected, that the deed in question must operate as a bargain and sale, or a covenant to uses, and that in such cases there is a use upon a use, which cannot be.

That it may operate as either, if necessary to effectuate the intention of the parties, there can be no doubt, because it contains both a *good* consideration, as marriage had, and a *valuable* one, twenty shillings paid, which are sufficient to raise a use the one way or the other.

It is true, the courts of law in England have held that no use could be limited upon a use; and that when a man bargains

deed. Revised Stat. c 59. § 2. See *Fowler* v. *Shearer*, 7 Mass. R. 14; *Den* v. *Crawford*, 3 Halsted, 90; *Whitbeck* v. *Cook*, 15 Johns. R. 483; *Nicholson* v. *Helmsley*, 3 Harr & M'Hen. 409.

And such deed will not *estop* the wife from setting up a subsequently acquired interest in the same lands. *Jackson* v. *Vanderheyden*, 17 Johns. R. 167.

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and sells his lands for money, which raises a use by implication to the bargainee, the limitation of a further use to another person is repugnant, and therefore void. 2 Bl. Com. 335, 336; *Tyrrel's Case*, Dyer, 155; *S. C.* 1 And. 37, *pl.* 96; *Corbet's Case*, 2 And. 136; Lill. Pract. Conv. 15, 20, n. *(b)*; *Dillon* v. *Fraine*, Poph. 81.

This objection seemed to be strongly relied upon at bar, and is indeed the most plausible of them all.

It is well known to the counsel on both sides, that the deed in question has been considered by a late learned judge (*Trowbridge*), either as a deed of bargain and sale, or as a covenant to stand seised to uses; and this probably gave rise to this last-mentioned objection, which may have brought on the present suit. But it should be remembered, that he contemplated the case upon narrower ground than it now stands upon, and was considering only whether the deed would operate in either of these ways; or in other words, whether the design of it could be executed in any way but by fine or recovery to uses, or in the common mode of this country, by *two* deeds, as was then, and is now contended. The objection or idea of a use upon a use had not then been raised.

If the case turned upon the doctrine of a use upon a use being void in law, it would be necessary for me to go fully into it; and to see whether it ought to be admitted in this country, where we have no court of equity to enforce the execution of the *second* use under the name of a trust, or in any shape whatever. 2 Bl. Com. 336. I will only observe respecting this doctrine, that it has been severely censured both by Judge *Blackstone* and Lord *Mansfield*. The latter says, "It was not the liberality of the courts of equity, it was the absurd narrowness of the courts of law, resting on literal distinctions, which in a manner repealed the statute of uses, and drove *cestui que trusts* into equity." 2 Doug. 774.

Without meddling further with this doctrine, let us see whether a use upon a use does in fact exist in this case. This, it seems, must depend upon the nature of the deed in question. If it should be taken as a deed of bargain and sale, then there is a use upon a use, because, as has been said

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already, a freehold in corporeal hereditaments cannot be created or transferred at common law but by matter of record, or by livery of seisin.

Therefore deeds of bargain and sale do not of themselves transfer the *legal* estate; they are only real *contracts* upon valuable consideration for passing lands, &c. whereby the bargainor does not convey, but contracts to convey the land to the bargainee, and becomes by such bargain a trustee for or seised to the use of the bargainee. 2 Inst. 672; 2 Bl. Com. 338; *Sharington* v. *Strotton*, Plow. 301. The property or possession of the soil remained in the bargainor; the bargainee had neither *jus in re* nor *ad rem*, but only a confidence or trust; or in other words he was entitled to the use or profits of the land: for which, however, he had no remedy by the common law, but only in chancery; which would compel the bargainor (who had received a valuable consideration of the bargainee) to obey the directions of the bargainee with regard to the disposition of the use or profits of the land. 2 Bl. Com. 137; *Chudleigh's Case*, 1 Rep. 121 *b*; Hawk. Abr. 363; Plow. 301.

Thus the matter stood before the making of the statute of uses, 27 *H.* 8, *c.* 10, which enacts, that when any person shall be seised of lands, &c. to the use, confidence, or trust of any other person, the person entitled to the use, shall from henceforth stand and be seised or possessed of the land, &c. of and in the like estate as he has in the use, &c. and that the estate of the person so seised to uses, shall be deemed to be in him who has the use, in such quality, manner, form, and condition, as he had before in the use.

Now, though the statute *executes* the use, by conveying the possession to the use, and transferring the use into possession, thereby making *cestui que use* complete owner of the lands, &c. as well at law as in equity, yet it does not abolish the conveyance to uses, but only annihilates the intervening estate, and turns the interest of the *cestui que use* into a *legal* instead of an *equitable* ownership. 2 Bl. Com. 333. The use still exists. The bargain and sale first vests the use, and then the statute vests the possession. 2 Bl. Com. 338; *Eustace* v. *Scawen*, Cro. Jac. 696.

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So that notwithstanding the operation of the statute, Gill and his wife, if the deed is taken to be a deed of bargain and sale, must, in the first instance, stand seised to the use of Scott, who, by the terms of the deed, is to hold "to the use of them, their heirs and assigns for ever, and the heirs and assigns of the longest liver of them, and to no other use whatsoever."

But supposing that here is clearly a use upon a use, and also that the doctrine respecting it, established in the courts of law in England, should be received in its full extent in this country, what would be the consequence, as applicable to this case? Is the deed itself to be considered as null and void, so that no estate passed in virtue of it to Scott, as is contended, or is the use therein limited *to themselves*, alone to be considered null and void? On the first supposition, Gill's wife must have died seised of the demanded premises, and they would descend to her heirs at law; otherwise, not. Where a *feoffment* is made to A and his heirs, to the use of B and his heirs, in trust for C and his heirs, it is held that the statute *executes* the *first* use in B, and that the *second* is a mere nullity; not that the deed itself is a nullity. 2 Bl. Com. 335, 336; 1 And. 37; 2 And. 136.

This is a strong case to show what Lord *Mansfield* calls "the absurd narrowness of the courts of law." For it is evident, says *Blackstone*, and so must every one say, "That B" (the first *cestui que use*) "was never intended by the parties to have any beneficial interest" in the lands. Yet the substantial part, the intention of the parties, clearly expressed in the feoffment, was made to yield to what he calls "technical scruples."

However this may be, to clear away the difficulty of a use upon a use, and to effectuate the manifest intention of the parties, I shall consider the deed neither as a bargain and sale, nor as a covenant to stand seised to uses; but as a *feoffment* to uses, by which the *legal* estate passes to the feoffee. The case just cited proves this; otherwise the statute could not have executed the use to B as the *first cestui que use*.

But a more particular consideration of the doctrine of uses may throw more light upon this point. 531

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Conveyances to uses are of three kinds only: first, by bargain and sale; secondly, by covenant to stand seised to uses; and thirdly, by feoffment, fine, or recovery to uses. Bac. Abr. *Uses*, *E*; *Heyns* v. *Villars*, 2 Sid. 158.

And uses may be raised two ways: first, by *transmutation* of the *estate*, as by fine, common recovery, or feoffment; and secondly, *without* transmutation of the estate, by bargain and sale, or covenant to stand seised to uses. Co. Lit. 271 *b*; Hawk. Abr. 363; *Sharington* v. *Strotton*, Plow. 301, 303.

If a man bargains and sells lands to another and his heirs, and before the deed be enrolled he levieth a fine, or maketh a feoffment to the bargainee and his heirs of the same lands; and after, and within the six months, the deed is enrolled, the bargainee shall be in by the fine or feoffment, and not by the bargain and sale, both by reason of the word *only* (in the statute), and that *the estate by the common law vested* shall be preferred. 2 Inst. 671, 672.

By the common law a feoffment puts the *legal* estate out of the feoffor, and he hath only a trust left. 2 Sid. 157. 3 Salk. 387.

Cestui que use could not at common law alien the *legal* interest of the lands, without the concurrence of his feoffee, *to whom he was accounted tenant at sufferance*. 2 Bl. Com. 331 But the feoffee might sell the land from *cestui que use*, and he had but his remedy in chancery. Noy's Ten. 16. The land itself was liable to escheat whenever the blood of the feoffee to uses was extinguished by crime or defect.

The feoffee was always taken as the owner of the land, and at common law was the very tenant. 3 Salk. 386.

If a feoffment was made to A and his heirs, to the use of B and his heirs, A, the feoffee and *terre tenant*, had the legal property and possession of the land, but B, the *cestui que use*, was in conscience and equity entitled to have the profits and disposal of it. 2 Bl. Com. 328.

But the statute having united the estate to the use, feoffees to uses have now no estate or interest at all, but in respect of
n32 the contingent estates and uses limited in the deed. "They are but conduit pipes to lead the uses." 3 Salk. 386; Noy's Ten. 15.

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I have cited these authorities merely to show the difference of a use raised by feoffment, and by bargain and sale, or by covenant to stand seised to uses; that when raised by feoffment, the feoffor, having parted with the legal estate, cannot stand seised to the use of the feoffee, but when raised by bargain and sale, or covenant, the bargainor or covenantor, retaining in themselves the *legal* estate, do stand seised thereof to the use of the bargainee or covenantee.

Apply this principle to the present case, and if the deed in question is to be taken as a feoffment, it is clear there cannot be a use upon a use; there being but one use limited by the deed itself, and none created by the operation of law. Here, then, is the great question in this case.

It seems evident to me, that a deed executed, acknowledged, and recorded as our statute requires, cannot be considered as a bargain and sale, because the legal estate is thereby passed without the operation of the statute of uses, in as ample a manner as by a feoffment at common law, accompanied with the ancient ceremony of livery of seisin.

Besides, I have real doubts whether with us there can be a proper deed of bargain and sale partaking of the nature of that in England, so far as to require the operation of the statute of uses to give it effect, notwithstanding our statute makes use of the term.

Feoffment is derived from the word *feoffare* or *infeudare*, to *give one a feud*; and is properly *donatio feudi*. And it may be defined, the gift of any corporeal hereditament to another. 2 Bl. Com. 310.

But by the mere words of the deed, the feoffment is by no means perfected. There remains a very material ceremony to be performed, called livery of seisin; without which the feoffee has a mere estate at will. 2 Bl. Com. 311.

Now by the common law of England, *no deed*, however aptly expressed to give a fee or a feud, can pass one, without it is accompanied with livery of seisin.

Yet it seems to be a legal idea, that whatever passes or 533
gives a feud, though unaccompanied in fact with livery of seisin, may with propriety be considered as a feoffment, or tantamount thereto, as it hath the whole effect of a deed of feoff-

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Thatcher v. Omans.

ment accompanied with livery of seisin. Thus Lord *Coke* calls a fine a feoffment of record. Co. Lit. 50 *a*. And *Blackstone*, aiming at more accuracy, calls it an acknowledgment of a feoffment on record, and says it has at least the same force and effect with a feoffment, in the conveying and assuring of lands 2 Bl. Com. 348. So a conveyance by lease and release is said to amount to a feoffment. 2 Bl. Com. 339.

Now the *St.* 9 *Will.* 3, *c.* 7. declares, that deeds shall be valid to pass lands, when they are accompanied with the extra circumstances of *acknowledgment* and *recording*, without any other act or ceremony in the law whatever; and, of consequence, they may pass them without the act of livery of seisin. Nay, the statute goes further, and makes them good and effectual in law to hold lands against the grantor or grantors and their heirs, even without acknowledgment or recording; so that as to them the fee passes by the bare execution of the deed.

Supposing the difficulty of a use upon a use to be cleared away, by considering this deed as a feoffment to uses, I am sensible the authorities to this point do not apply to the case of a feme covert, who by the common law of England can make no deed.

Yet if there is any mode by which husband and wife may *there* convey her inheritance to a stranger and to themselves, the same may be done here in virtue of our statute by deed executed, acknowledged, and recorded. Not, indeed, directly to themselves, for in contemplation of law they are but one person, but indirectly they may do it.

Now it is done in England by the husband's covenanting with a third person that he and his wife shall levy a fine for such purpose; which being done, completely executes the design. 2 Bridgm. Conv. 170. *Vid. ante, p.* 526.

By the deed in question, Gill and his wife make a feoffment of her inheritance to Scott, to the use limited in the deed, that is to say, to themselves as joint tenants in fee.

534 Here is no direct conveyance to each other, or to themselves. But the conveyance is to a third person who stands seised to the use limited in the deed. And then the statute

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of uses, and not the act of the grantors or the deed itself, executes the use, or unites the legal estate which is in Scott, to the use, thereby making Gill and his wife complete owners of the lands.[1]

I am unable to discern any solid reason why this mode of conveying the inheritances of femes covert ought not to be deemed as valid as the common law mode, or our more usual one, of the husband and wife first making a deed of them to a third person, with a view only and for the intent that such third person should reconvey them to the husband and wife, to hold as shall be agreed upon between all the parties.

The objection, that this particular form of conveyance is not supported by common law, or by any statute or usage of our own, does not appear to me of great force.

We know the origin of fines, recoveries, feoffments to uses, deeds of bargain and sale, covenants to uses, and leases and releases. These were all once novel, but have now become common assurances, though some of them were founded in fiction and falsehood.

They were not considered void on account of their novelty, but were left to operate so far as they could, consistently with established principles of law. The feoffment to uses, for example, was not considered as void, but permitted to operate so far as to convey the *legal* estate, although the use could not be executed, nor the manifest intention of the parties carried into effect, at law.

The remedy for this substantial defect, we know likewise, was an assumption of power in the courts of equity, to compel a performance of the trust or intention of the parties according to equity and good conscience.

At June term 1792 at Ipswich, judgment was rendered as of May term 1792 at Plymouth, that the tenants were not guilty of the disseisin complained of.

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[1] See *Chamberlain* v. *Crane*, 1 N. Hamp. R. 64.

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INDEX.

ABATEMENT

1. The provision in *St.* 1782, *c.* 11, § 6, that pleas in abatement in the Court of Common Pleas shall be filed before the jury is empannelled, is no longer in force; and a rule of that court, that such pleas "may be filed at any time during the first four days of the return term, and not afterwards," is valid by virtue of *St* 1820, *c.* 79, § 7. *Thompson* v. *Hatch and Trustees.* 512

2. So long as a rule of court remains unrepealed, it cannot be dispensed with in a particular case. Thus, where a plea in abatement, in consequence of misinformation from a judge of the Court of Common Pleas, was not offered until the *fifth* day of the term, and was then, by leave of the judge, filed as of the *fourth* day, the filing was held to be improper, being in contravention of the rule above recited. *Ibid.*

3. The plaintiffs did not appeal from such decision of the judge, but demurred to the plea, assigning for cause, that it was filed too late; but this Court, notwithstanding the irregularity in bringing up the case, seeing upon the record produced that the plea was filed contrary to the standing rule of the court below, rejected such plea, and awarded a *respondeas ouster.* *Ibid.*

ACTION.

In case for obstructing the plaintiff's mills, the declaration alleged that the mills were leased, and that in consequence of the obstruction the tenants had threatened to quit, and the plaintiff had therefore been constrained to make a reduction in the rents. *Held*, that a sufficient cause of action was here set forth, and that a recovery would be a bar to any action by the tenants for the same obstruction. *Baker* v. *Sanderson.* 348

See FRAUDULENT CONVEYANCE, 3
LEGACY, 2, 3.
PARISH, 10.
SHIPS &c., 5.

ADMINISTRATION.

1 To sustain an action upon an administration bond for the benefit of a creditor, there must have been, if the estate is solvent, a judgment of court, ascertaining the debt, and then a demand of satisfaction on the administrator; if insolvent, an allowance of the debt by commissioners, a decree of distribution, and a like demand; wherefore, where an ancillary administrator on an insolvent estate of a person domiciled in a foreign country, represented the estate as insolvent, and commissioners were appointed, and the claims allowed by them were less than the assets here, and the judge of probate decreed payment of such debts in full, and on demand the administrator refused to make such payment, it was *held*, that the decree, treating the estate as solvent, was a nullity, no decree being in such

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case necessary or authorized by law, and that the non-performance of it was not a breach of the bond. *Dawes* v. *Head.* 128

2. One of two persons, both subjects of, and domiciled in, the same foreign country, dies indebted to the other, and an original administration is granted in the foreign country, and an ancillary one here. *Held*, that such debt, though it may have been contracted here, must be referred for settlement to the original administration. *Ibid.*

3. Where the whole estate of a deceased person domiciled abroad is not sufficient to pay all his debts, *it seems* that the funds collected by an ancillary administrator here are not to be applied to the payment in full of the debts due to our own citizens; but the proper course should be, to retain the funds here for a *pro ratâ* distribution according to our laws among our citizens, having regard to all the assets in the hands of the administrators, both principal and ancillary, and to all the debts due by the laws of either country, and disregarding any preference that may be given to one species of debt over another, and to remit any surplus to the principal administrator. *Ibid.*

4. Whether such a disposition of the funds here may be ordered by the probate court, *quære;* but it *seems* that it may be on a bill in chancery. *Ibid.*

5. Whether citizens of another of the United States can be considered as upon the same footing with the citizens of this state in regard to such funds, *quære.* But in the case of a solvent estate, *it seems* that they may enforce their demands against the ancillary administrator here having assets. *Ibid.*

6. A mere debtor to the estate of a person deceased, is not interested in, and cannot appeal from, a decree of a judge of probate granting letters of administration on such estate. *Swan* v. *Picquet* 443

ADVANCEMENT

A testator, after devising one fifth part of his estate to each of his children, directed that all he had advanced to them respectively, and for which he had claims and demands, should be considered as a part of his estate, and as a part of the devises. These claims against the different children were unequal in amount, and consisted of promissory notes on interest and book charges. It was *held*, that the sum for which any note was given, should be considered as an advancement, not bearing interest, and that the promisor should not be allowed to pay it as a debt in order to entitle himself to a fifth part of the testator's real estate. *Hall v. Davis* 450

AGENT

See PARISH, 7, 8.
SHIPS &c., 2, 4, 5, 6, 7, 8

ALIEN

See ESCHEAT.

AMENDMENT.

1. A merchant in New York sold goods there, and received the purchaser's negotiable note in full for the goods, which note was afterwards lost. In *assumpsit* on an account annexed to the writ, for goods sold, it was *held*, that the plaintiff could not amend his writ by inserting a count upon the note, the note and the account being different causes of action, but that he was entitled to recover on the original count, the giving of the note not being by the laws

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of New York a payment. *Vancleef* v. *Therasson.* 12

2. Partnership property was attached upon a writ containing the names of three only out of four surviving partners, and the next day the name of the fourth was inserted, and a new attachment made upon the same property; but in the mean time another creditor had attached the property upon a writ against the four partners. *Held*, that the first attachment was vacated as against the second attaching creditor. *Denny* v. *Ward.* 199

3. On the back of a sergeant's warrant was a certificate, that he had "taken and subscribed the oath according to law before me, J. T. W. commanding officer." *Held*, that this was not a sufficient certificate of his being appointed clerk of the company, and that it could not be amended by inserting proper words of appointment, to sustain a prosecution commenced by him as clerk. *Commonwealth* v. *Hall.* 262

4. The rights of a subsequently attaching creditor will not be affected by an amendment of a mistake in the first attaching creditor's writ, though appearing manifestly on the face of the writ to have been occasioned by a mere slip of the pen. *Putnam* v. *Hall.* 445

5. A bill of particulars is amendable, like a declaration. *Babcock* v *Thompson.* 446

See VERDICT.

ASSIGNMENT.

Where it was agreed before the sailing of a vessel, that the bill of lading of the cargo should be assigned as security for a debt, but the assignment was not made until after she had sailed, though by being antedated it purported to have been made while she was at home, and no possession of the property was taken, it was *held*, nevertheless, that the assignment was valid as between the parties, and as against strangers who should not acquire a legal title to the property without notice of the assignment. *Peters* v. *Ballistier* 495

ASSUMPSIT.

See BILLS OF EXCHANGE &c., 4.
PARISH, 10.
PARTNER, 4, 5
SHIPS &c., 2.

ATTACHMENT.

1 Whether a stagecoach, when actually travelling, is liable to be stopped and attached on mesne process, *quære*. *Potter* v. *Hall.* 368

2. But a stagecoach was attached about the time fixed for its departure, when part of the horses were fastened to it, and the passengers were engaged and ready to take their seats. and the attachment was held valid. *Ibid.*

3. So of an attachment of a stagecoach which had been driven into the yard of the tavern where it was accustomed to put up at the place of its destination, but had not distributed all its passengers *Ibid.*

See AMENDMENT, 2.
MORTGAGE, 8, 9.

BAIL.

See PRACTICE, 2.

BANK.

A bank is bound to produce its books for the inspection of a depositor, upon proper occasions, and the officers of the bank having charge of them are so far the agents

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of both parties. *Union Bank* v. *Knapp.* 96

See BILLS OF EXCHANGE &c., 14, 15.
BOND, 3, 4.
EVIDENCE, 4, 5, 6.
LIMITATIONS, STATUTE OF, 2
PAYMENT.

BASTARD.

1 Upon a complaint under *St.* 1785, *c.* 66, § 2, [Revised Statutes, *c.* 49, § 1,] for the maintenance of a bastard child, evidence that the general character of the complainant for chastity, previous to her connexion with the respondent, was bad, and that she had previously had frequent criminal intercourse with other persons, is not admissible for the purpose of impeaching her credit as a witness. *Commonwealth* v. *Moore.* 194

In such a prosecution the complainant entered her complaint in the Court of Common Pleas, by attorney, but pleaded by guardian; and upon *certiorari* after judgment it was presumed that she was of age, the contrary not appearing and not being inferrible from her pleading by guardian. *Ibid.*

3. Such a complaint purporting to be made pursuant to the statute, but not concluding with *contra formam statuti*, was held sufficient. *Ibid.*

BAWDY HOUSE.

1. Letting a house to a woman of ill fame, knowing her to be such, with the intent that it shall be used for purposes of prostitution, is an indictable offence at common law. *Commonwealth* v. *Harrington.* 26

2 The time when such contract is alleged in the indictment to have been made, is immaterial. *Ibid.*

BILGING.

See INSURANCE, 1, 2.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where a note is given in the name of a firm, by one of the partners, for the private debt of such partner, and known to be so by the person taking the note, the other partners are not bound, unless they have been consulted and have consented to the transaction. *Chazournes* v. *Edwards.* 5

2. The person taking such note cannot recover on it against one who indorses it without any consideration, thinking it to have been made by the firm; and the burden of proof is on the holder, to show that the indorser knew the circumstances under which it had been made. *Ibid.*

3. A merchant in New York sold goods there and received the purchaser's negotiable note in full for the goods, which note was afterwards lost. In *assumpsit* on an account annexed to the writ, for goods sold and delivered, it was *held*, that the plaintiff could not amend his writ by inserting a count upon the note, the note and the account being different causes of action, but that he was entitled to recover on the original count, the giving of the note not being by the law of New York a payment. *Vancleef* v. *Therasson.* 12

4 A *bonâ fide* holder for a valuable consideration, of a check payable to bearer, addressed to no particular person, may recover in an action against the drawer for money had and received. *Ellis* v. *Wheeler.* 18

5. Where a partner having absconded, his copartner told the holder of a note against them not then due, that they were going to fail, and renewed the note in the name of the firm, making it payable on demand in order that the creditor might secure himself, it was *held*, that this note did not bind the

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absconding partner, notice of the dissolution being either not necessary, or being implied by the transaction itself. *Whitman* v. *Leonard.* 177

6. The contents of a written notice to an indorser of a promissory note may be proved by parol, without giving notice to produce such writing. *Eagle Bank* v. *Chapin.* 180

7. A notary makes a demand on the maker of a promissory note at New York on Friday, and on the same day gives to his clerk a notice to the indorser directed to the holder at New Haven, to be put into the post-office. On Monday morning the holder sends it to Hartford by a messenger, with orders to inquire where the indorser lives, and there the messenger puts it into the post-office, directed to the indorser at Springfield. The mail closes every day at 7 A. M. at New York, and reaches New Haven in the evening, and Springfield at 11 A. M. on Monday, and 4 P. M. on Tuesday; and a letter put into the post-office at Hartford on Monday evening reaches Springfield at 4 P. M. on Tuesday. *Held*, that as the notice arrived at New Haven, it was not necessary to prove that it was put into the post-office at New York; that whether it reached New Haven on Saturday or on Sunday was immaterial, as Sunday was not to be counted; that neither the notary nor the holder was bound to know where the indorser resided, and that both had used due diligence to give him notice. *Ibid.*

8 Usury between the indorser and indorsee in the transfer of a promissory note, cannot be set up in defence to an action by the indorsee against the maker; consequently the indorser cannot be admitted as a witness to prove such usury. *Knights* v. *Putnam.* 184

9. In an action by the indorsee against the maker of a note indorsed in blank, the indorser, although he may have released his claims upon the note, is not a competent witness to prove that it was pledged to the indorsee as collateral security for a debt less than the amount of it. *Ibid.*

10. The *St.* 1818, *c.* 60, which, in case a guardian shall be appointed to a spendthrift, avoids "every gift, bargain, sale, or transfer of any real or personal estate," made by the spendthrift after the complaint of the selectmen to the judge of probate, and the order of notice thereon, shall have been filed in the registry of deeds, does not apply to promissory notes. *Smith* v. *Spooner.* 229

11. A, being indebted to B, agrees to give him a note to be discounted at a bank, and accordingly gives one signed by himself as principal and C as surety, payable to the bank. The bank refuses to discount it, or to authorize a suit in the name of the bank; whereupon B sues both promisors in his own name. *Held*, that C, being by the terms of the contract liable only to the bank or their assignees, and there being no evidence of privity between him and B, the action would not lie. *Allen* v. *Ayres.* 298

12. A tender by the indorser of a promissory note, on the day next after it has become due, is not sufficient, without a tender of interest. *City Bank* v. *Cutter.* 414

13. No protest is necessary upon the dishonor of a promissory note, and notarial fees cannot be recovered of the indorser. *Ibid*

14. The day of commencement at Harvard College is not a holiday; but a usage of any bank, in respect to notes falling due on that day, to make a demand on the maker and give notice to the indorser on the day preceding, will be binding on an indorser of a note discounted for him at the bank,

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who is conusant of such usage; and whether the note is made payable at such bank or not, is immaterial. *Ibid.*

15. In an action on a note discounted by a bank, against an indorser conusant of the usage of such bank, an allegation of a presentment and demand on the maker is supported by evidence of a written demand being left at his place of business according to such usage *Ibid.*

16 Whether in an action upon a negotiable promissory note, given for the purchase money of land conveyed by deed with the usual covenants of seisin and warranty, the action being between the original parties, it is competent for the defendant to set up, by way of defence, a total want of title in the grantor at the time of the conveyance, and an eviction of the grantee, *quære*. *Knapp* v. *Lee*. 452

17. But where the promisee had died insolvent, and the action was brought by the administrator of an indorsee, who, at the time of the indorsement, had notice that the title was questioned, such defence was allowed under the general issue, since the defendant could not plead the demand on the covenants by way of set-off, nor avail himself of it in a cross action; and in such a case the plaintiff may introduce evidence to show that the value of the land, at the time of the eviction, was less than the amount of the note. *Ibid.*

18. A knowledge on the part of such indorsee, that the title to the land is questioned, and that the grantee intends to resist payment of the note in case he shall be evicted, without a knowledge of any particular fact tending to invalidate the title, is sufficient notice to put him on his guard, and to let the grantee in to make such defence. *Ibid.*

See PAYMENT.

BOND.

1. An action was brought against two obligors in a joint and several bond. One died, and his death was suggested on the record, and the action proceeded against the other. *Held*, that a separate action might be sustained against the executor of the deceased, while the first action was pending against the survivor. *State Bank* v. *Welles* 15

2. A bond conditioned that the obligor shall give the obligee all the freighting of the obligor's goods up and down the Connecticut river, at the customary price, to be paid in goods at the usual price, and that he shall not encourage any other boatman to compete with the obligee in the business of boating, is not void as being in restraint of trade, and is founded on a sufficient consideration. *Palmer* v. *Stebbins*. 188

3. The charter of a bank required the cashier to give bond with two sureties, to the satisfaction of the board of directors, for the faithful discharge of his duties. *Held*, that where the board, by a vote, approved of two persons as sureties in a bond to be given, and a bond was afterwards found in the possession of the president, duly executed by the cashier and such sureties, there was a sufficient acceptance of it by the corporation. *Dedham Bank* v *Chickering*. 335

4. A person was elected cashier of a bank in March 1814, when it was first organized, and again in October 1814, 1815, and 1817, by directors chosen annually, and he continued to act as cashier from his first election until 1823, when he committed a breach of duty. *Held*, that a bond given by him with sureties upon his first election for the faithful performance of his duties "so long as he should continue in said office," extended

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to this breach of duty, it not appearing, either in the bond itself, or in the charter, records, or regulations of the bank, that the office of cashier was an annual office. *Ibid.*

See EXECUTOR &c. 1, 2, 5.

BOSTON, CITY OF

See BY-LAW.

BROKER.

See LIEN.

BY-LAW.

1. The legislature have authority to enact, that the interest which an inhabitant of a city may have in a penalty for the breach of a by-law thereof, shall not disqualify him to act as a judge, juror, or witness, in a prosecution to recover such penalty. *Commonwealth* v. *Worcester.* 462
2. The city of Boston have authority to make a by-law prohibiting persons having the care of a wagon, cart, &c., from driving their horses on a trot or gallop in the streets of the city, such by-law not being in restraint of trade, but a reasonable regulation of it. *Ibid.*
3. Although the object of such by-law be to prevent passengers in the streets from being endangered by fast driving, yet in a prosecution on the by-law it is not necessary to prove that any individual was actually endangered thereby. *Ibid.*
4. Upon an indictment for a breach of such by-law, evidence of the defendant's general character as a carefu. driver, is inadmissible. *Ibid.*
5. So of evidence of permission from the mayor and aldermen of the city to drive faster than the by-law allows. *Ibid.*
6. Whether a by-law be reasonable or not, is for the court to determine, and evidence to the jury on that question is inadmissible *Ibid.*
7. An act of the legislature, providing that in prosecutions on the by-laws of Boston it shall not be necessary to set forth the by-law at large in the complaint, is not unconstitutional as conferring an exclusive privilege. *Ibid.*
8. So of *St.* 1817, *c.* 50, providing that such prosecutions may be in the name of the commonwealth: and that statute is not repealed by the act by which the town of Boston was incorporated as a city. *Ibid.*
9. Whether a complaint for a breach of a by-law of Boston, concluding against the form of the by-law in such case made and provided, be sufficient, without concluding also against the form of the statute, *quære.* *Ibid.*

CHECK.

See BILLS OF EXCHANGE &c., 4.

CONSIDERATION.

1. A promise to three, upon a consideration proceeding from them and a fourth person, will support an action brought by the three. *Cabot* v. *Haskins.* 83
2. Assuming a mere ideal danger which has no foundation in fact or in law, is not a valid consideration for a promise. Thus, where a person supposed himself liable to the United States, when by law he was not, on account of property assigned to him by a debtor of the United States, and upon restoring the property to the debtor assumed the risk of his liability, the debtor promising to pay him a sum of money therefor, it was *held*, that there was no possibility of loss in a legal sense, to the assignee and

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that the promise was without consideration. *Ibid.*

See BILLS OF EXCHANGE &c., 16, 17, 18
BOND, 2.
PARISH, 10.
PROMISE.

CONSUL, FOREIGN.

See PRACTICE, 2.

CONTRACT.

See EVIDENCE, 37.
INFANT, 1.
SALE.

CORPORATION

It seems that corporations created for specific objects have no power to take and hold real estate for purposes wholly foreign to those objects. *First Parish in Sutton* v. *Cole.* 232

See BOND, 3.

COSTS.

1. Two defendants in an action of *trespass* joined in their plea, and in the Court of Common Pleas judgment was given in favor of one and against the other. The plaintiff appealed from both judgments, and in this Court the judgment was in favor of both defendants. *Held*, that they were not entitled to several costs. *Ewer* v. *Beard.* 64

2. In trespass a plaintiff recovered a verdict for 275 dollars, and afterwards judgment was rendered for 308, being the former sum with interest. The defendant reviewed, and a verdict was returned for 300 dollars; the first judgment was thereupon affirmed, and the plaintiff took judgment for 300 dollars and costs. Upon error it was *held*, that the first judgment should have been affirmed in part only, and that the defendant was therefore entitled to the costs of the review. *Johnson* v. *Wetherbee.* 247

3. Where each party files his exceptions to the direction of the Court of Common Pleas, and the exceptions are overruled and the judgment affirmed, each is entitled to his costs. *Shattuck* v. *Woods.* 267

4. Three defendants in trespass joined in a plea in the Court of Common Pleas, which was demurred to, and in this Court, the plea and demurrer being waived, they pleaded severally and two were acquitted. *Held*, that the two should recover joint costs to the time of severing in their pleas, and several costs afterwards. *Held*, also, that they should recover two thirds of the costs of depositions taken and witnesses summoned for the use of all three before they severed. *West* v. *Brock.* 303

COVENANT.

A lessee for years of a farm covenanted not to "carry off any hay or stover of said farm under forfeiture of ten dollars for each ton." A quantity of hay was attached on mesne process by his creditors, and carried off against his consent. *Held*, that this was not a breach of the covenant *Smith* v. *Putnam.* 221

See BILLS OF EXCHANGE &c., 16, 17.

DAMAGES.

See EVIDENCE. 37.
LIBEL, 9, 10.

DEBTOR.

See GAOL.

DEED

1. A grants land to B in fee with

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warranty, and then mortgages the same land to C, who has no notice of the former conveyance, and whose deed is recorded before B's. After B's deed is recorded, C assigns the mortgage to the demandant, who releases to A, and at the same time takes back from him a new mortgage with warranty. B dies, leaving A and the tenant his heirs, having been in possession during the time of all these conveyances. *Held*, that the release to A did not give him an instantaneous seisin so as to enable him to reconvey an estate, but that it operated by estoppel a discharge of the first mortgage, leaving B an unincumbered fee; but that when the land came to A and the tenant by descent, the demandant took A's moiety by estoppel by virtue of the second mortgage. *Somes* v. *Skinner*. 52

2. A deed creating an estoppel to a party who undertakes to convey by it land in which he has nothing at the time, but to which he afterwards acquires a title by descent or purchase, passes an interest and a title from the moment such estate comes to the grantor, not only against the grantor and those claiming under him, but also against strangers who come in after the estoppel. *Ibid.*

3. Implied notice of a prior unregistered deed, to avoid a subsequent deed or attachment, must be not merely a probable, but a necessary and unquestionable, inference from the facts proved. *M'Mechan* v. *Griffing*. 149

4. Such inference cannot in all cases be made from an open, peaceable, and exclusive possession. Thus, where a person owning and in possession of part of a lot of land not divided by any partition fence, purchased the residue, consisting principally of woodland, and which had not been occupied by the grantor, repaired the fence round the lot, depastured cattle in it, sold trees from the part purchased, and removed an old hovel standing on the same part, it was *held*, that these facts did not imply notice. *Ibid.*

5. Whether if the evidence of possession be such as to raise a legal presumption of notice, such presumption may not be rebutted by other evidence, *quære*. *Ibid.*

6. J. C having inherited one fourth part of certain land which had been set off to the widow of W. C. for her dower, and having purchased of T. G. in 1798, for 700 dollars, two other fourths, conveys to J. T., in 1799, for 350 dollars, "one half of all that part of the real estate of W. C. which was set off to the widow, which was conveyed to me by T. G., reference to his deed being had, meaning to convey by this instrument the full one half of the above described estate as the same is now in common and undivided;" and in 1811 he releases to J. T. all his right in the rest of the dower land. In 1817, J. T. reconveys to J. C. "an undivided moiety of certain real estate, the same being a part of the real estate of W. C. and set off as dower, &c., *meaning hereby to reconvey to J. C. the same premises that J. C. conveyed to me in* 1811." *It seems*, that one half of the dower land passed by the first deed of J. C. to J. T.; but it was *held*, that if only a fourth passed, yet that J. T.'s deed to J. C. passed a moiety of the dower land, either according to the intention of the parties, or if not, because the clause above italicized was not a reservation, exception, or explanation of the preceding words of grant, but was repugnant to them, and therefore void. *Cutler* v. *Tufts*. 272

7. The owner of a mill above a bridge, and of another below, conveyed this last, giving to the grantee a right "to make and maint a n

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a dam to accommodate said mill, below the bridge," of a certain height. The grantee repaired and rebuilt, with some alteration, an old dam, which satisfied the terms of the deed, and afterwards built another dam below the bridge of the same height, the effect of which was to throw more water into his pond, and to injure the mill above the bridge. *Held*, that he had a right to maintain one dam only, and that the erection of the new dam was not authorized by the grant. *Baker* v. *Sanderson*. 348

8. In an action by one of two grantors against the grantee, in which the construction of the deed came in question, it was *held*, that the other grantor was a competent witness to establish a collateral fact as to the situation of the premises at the time of the grant. *Ibid.*

9. By a grant of a parcel of land which is covered by the sea at high water, nothing passes except what is comprehended within the terms of the deed; the colony law of 1641, declaring "that in all creeks, coves, &c., the proprietor of land adjoining shall have propriety to the low water mark" not exceeding 100 rods, being inapplicable to such a grant. *Luſkin* v. *Haskell*. 356

10. Husband and wife being seised in fee of land in her right, in consideration of the marriage and of twenty shillings, by deed acknowledged and recorded, "gave, granted, bargained, sold, enfeoffed, and conveyed" the same to J. S. in fee, to the use of the husband and wife, their heirs and assigns, and the heirs and assigns of the longest liver of them. *Held*, that the deed should be taken, not as a bargain and sale, or covenant to stand seised to uses, whereby there would be a use upon a use, but as a feoffment to uses; so that J. S. stood seised to the use limited in the deed, and then the statute of uses executed the use, thereby making the husband and wife complete owners of the land as joint tenants in fee. *Thatcher* v. *Omans*. 521

See EVIDENCE, 13, 14.

DEPOSITION.

1. The *St.* 1797, *c.* 35, § 8, respecting depositions *in perpetuam*, has reference to such only as are taken within this State. *Anonymous*. 14

2. Whether it is within the discretionary power of the Court to admit as a foreign deposition one taken *in perpetuam*, in another State, before any action was pending, *quære*. But such a deposition will not be admitted without proof that the adverse party will not be prejudiced by its admission. *Ibid.*

3. In general a deposition taken *in perpetuam* under *St.* 1797, *c.* 35, § 8, at the request of A upon notice to B, cannot be used in an action against B by C, a stranger not claiming under A, neither can A use it against any other person than B, or one claiming under him, unless such person lived more than twenty miles from the place of caption. *Welles* v. *Fish*. 74

See COSTS, 4.

DEVISE.

1. A parish, as well as a town, is capable of taking and holding a devise to be applied to the use of schools. *First Parish in Sutton* v. *Cole*. 232

2. Devise of "all the remainder of my estate, both real and personal, to my daughter S. A. and the children of her body, including all my wife has the improvement of during her life after her decease." S. A. had three children when the will was made, and a fourth was born afterwards, all of whom sur

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vived the testator, and two more were born after his decease, which happened in 1781. *Held*, that S. A. and her four children living at the time of the testator's death, took an estate together in fee simple in the real property — in the part in which the widow had a life estate, a vested remainder which opened to let in the two afterborn children. and in the rest a qualified fee so limited as to admit their claims by way of executory devise; and that no right by survivorship having accrued before the passing of *St.* 1785, *c.* 62, § 4, respecting jointenancies, the devisees from that time held as tenants in common. *Annable* v. *Patch*. 360

3. It seems also, that the afterborn children were entitled to share in the personal property by way of executory devise. *Ibid.*

See ADVANCEMENT.
WILL, 3, 4.

DIVORCE.

See HUSBAND AND WIFE, 3, 4.

DOWER.

See HUSBAND AND WIFE, 5.
MORTGAGE, 7

ENTRY, WRIT OF.

1. Where the demandant in a writ of entry makes out his title to a part only of the land demanded, he shall have judgment for that part. *Somes* v. *Skinner*. 52
2. Where a mortgagee recovered in a writ of entry against a stranger, the judgment rendered was conditional. *See St.* 1785, *c.* 22, § 1. *Ibid.*

EQUITY OF REDEMPTION.

See MORTGAGE, 1, 2, 5, 6, 7.

ESCHEAT.

The legislature of the commonwealth, for a valuable consideration, granted land to an alien, his heirs and assigns, with warranty. *Held*, that upon the death of the grantee the land descended to his heirs, who also were aliens, and that upon an inquest of office the commonwealth were estopped to set up the alienage of the grantee or of his heirs as the ground of an escheat. *Commonwealth* v. *Heirs of André*. 224

ESTOPPEL.

See DEED, 1, 2.
ESCHEAT.

EVIDENCE.

1. In *assumpsit* for goods sold, the plaintiff, to take the case out of the statute of limitations, proved that the defendant said he would pay for the goods, if *A. B. would say that he had had them*, or, *if the plaintiff would prove it by A. B.*— leaving it uncertain which expression was used. *Held*, that the plaintiff had not laid a foundation for the admission of proof of A. B.'s declarations. *Robbins* v. *Otis* 4
2. Upon the trial of an indictment against a married woman for larceny, evidence that her husband deposited a sum of money to procure the absence of a witness on the part of the government, is inadmissible, unless it is shown that she was privy to the transaction. *Commonwealth* v. *Robbins*. 63
3. A codicil fraudulently destroyed was established upon parol proof of its contents. *Clark* v. *Wright*. 67
4. In an action by a bank against a depositer for having overdrawn, the books of the bank are competent evidence to show receipts and payments of money. *Union Bank* v. *Knapp*. 96
5. If the clerk who made the entries is dead or insane, the book is ad-

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missible upon proving his handwriting. *Ibid.*

6. In an action by a bank against a depositer, who was supposed to have overdrawn in consequence of a mistake in the leger, the clerk who made the mistake said he did not know whether he was accountable or not, and that if the money should be lost he should remunerate the bank if required. *Held*, that he was not liable to the bank, or at most only on a contingency, and that he was a competent witness on the part of the bank. *Ibid.*

7. The contents of a written notice to an indorser of a promissory note may be proved by parol, without giving notice to produce such writing. *Eagle Bank* v. *Chapin.* 180

8. Upon a complaint under *St.* 1785, *c.* 66, § 2, [Revised Stat. *c.* 49, § 1,] for the maintenance of a bastard child, evidence that the general character of the complainant for chastity, previous to her connexion with the respondent, was bad, and that she had previously had frequent criminal intercourse with other persons, is not admissible for the purpose of impeaching her credit as a witness. *Commonwealth* v. *Moore.* 194

9. A husband conveyed his life estate in his wife's land to her father, who afterwards, being insolvent, reconveyed it to the wife, to prevent its being taken by his creditors; one of whom nevertheless extended an execution on the land. It was *held*, that parol evidence was inadmissible to prove that the conveyance to the wife's father was in trust for her use; so that the reconveyance was taken to be fraudulent as against creditors. *Smith* v. *Lane.* 205

10. Where a debtor in failing circumstances agreed to convey furniture in part payment of a debt, and at the same time stipulated with the creditor to have a lease of it for a year, and the transfer and lease were accordingly made, it was *held*, that this was not conclusive evidence that the sale was fraudulent as against other creditors. *Wheeler* v. *Train.* 255

11. On an indictment against an innholder, the minutes of the Court of Sessions of a license having been granted him to keep an inn, are admissible evidence to prove that fact, no extended record of the granting of such licenses being kept by the court. *Commonwealth* v. *Bolkom* 281

12. Where such a license has been granted, it will be presumed that the court had proper evidence before them, as the recommendation of the selectmen, &c. *Ibid.*

13. Where a grantor of land, having obtained possession surreptitiously of the deed, pretending that he would get it recorded, conveyed the land again to a person who had knowledge of the former conveyance, it was *held*, in an action by the heir of the first grantee against the second, that the demandant having traced the deed into the hands of the grantor, might give parol evidence of its contents without calling him as a witness, though released by the tenant, to prove its loss, or showing that it was not in the register's office; and that not knowing who were the subscribing witnesses, he was not bound to prove their handwriting; and that the declarations of the grantor previous to the second conveyance, were admissible to show such conveyance to be fraudulent. *Davis* v. *Spooner.* 284

14. Where a lost deed is not proved to have been destroyed, but only mislaid, *it seems* that the party should make affidavit that he has not been able to find it. *Ibid.*

15. In *case* for the continuance of an obstruction in a private way, a verdict and judgment on the general issue in a former action between the parties for the same

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obstruction, is admissible, though not conclusive evidence, to show that the plaintiff has a right to the way. *Parker* v. *Standish*. 288

16. In a question of the settlement of a female pauper depending on the val dity of her marriage, the pauper and her supposed husband are competent to testify concerning the marriage. *Raynham* v. *Canton*. 293

17. In such a case proof of a marriage *de facto* in another State, is sufficient to throw the burden of proof on the party impeaching its validity. *Semble*. *Ibid*.

18. A statute of another State, or its repeal, cannot be proved by parol evidence. *Ibid*.

19. A book purporting to contain the statutes of any one of the United States and to be printed by its authority, is *primâ facie* evidence of the written law of such State. *Ibid*.

20. *Aliter* of a printed book of statutes of a foreign nation. *Semble*. *Ibid*.

21. A libel was published in a newspaper printed in another State, but which usually circulated in a county in this State, and the number containing the libel was actually received and circulated in such county. *Held*, that this was competent and conclusive evidence of a publication within such county. *Commonwealth* v. *Blanding*. 304

22. The general rule is, that upon indictment the truth of a libel is not admissible in evidence. Whether in any particular case such evidence is admissible, is to be determined by the Court; and if admitted, the jury are to determine whether the publication was made with good motives and for justifiable ends. *Ibid*.

23. On an indictment for a libel published in a newspaper, charging a person with misconduct as an innkeeper, for which he was liable to punishment, it was *held*, that the truth of the libel was not admissible in evidence. *Ibid*.

24. A turnpike road may be laid out over an old county or town road; and the turnpike corporation's receiving toll for the road so laid out, is conclusive evidence of their being bound to keep it in repair: so that they cannot object that it was never accepted as a turnpike road, or that it is not of the width required by law. *Commonwealth* v *Worcester Turnpike Corporation*. 327

25. An execution levied on land must be returned into the clerk's office in order to complete the title of the creditor; but if it has been returned before it is offered in evidence of such title, although after the return day, it will be sufficient. *Prescott* v. *Pettee*. 331

26. In an action by one of two grantors against the grantee, in which the construction of the deed came in question, it was *held*, that the other grantor was a competent witness, to establish a collateral fact as to the situation of the premises at the time of the grant. *Baker* v *Sanderson*. 348

27. No inhabitant of a town is a competent witness, either at common law or by *St*. 1792, *c*. 32, to prove a custom for the inhabitants to dig clams in a particular spot. *Lufkin* v. *Haskell*. 356

28. By that statute an inhabitant is rendered competent, only in cases in which the town, in its corporate capacity, is a party or interested in the suit. *Ibid*.

29. In an action of slander, evidence tending to prove that the words spoken were true, or that there were reports in circulation of particular instances of impropriety in the plaintiff's conduct, will not be admitted under the general issue, in order to show that the defendant believed what he said to be true. *Bodwell* v. *Swan*. 376

30. Under such issue the defendant may produce evidence of the plaintiff's general character. *Ibid*

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31. Evidence of words spoken by the defendant after the commencement of the action, of a similar import with those charged in the declaration, is admissible to show malice. *Ibid*

32. The deliberate publication of a calumny, when the publisher knows it to be false, or has no reason to believe it to be true, is conclusive evidence of malice. *Bodwell* v. *Osgood.* 379

33. In an action for a libel, evidence of the defendant's procuring depositions, &c., to prove the truth of his charges, and afterwards declining to plead a justification, may be properly referred to the jury on the question of malice, but not on the question of damages. *Ibid.*

34. A town may acquire a right of way by grant, and exclusive uninterrupted use by the inhabitants for twenty years, unexplained, is evidence of a grant; but such way will be a private way, and a nuisance on it will not be indictable. *Commonwealth* v. *Low.* 408

35. A public town way can be established only in the mode prescribed by the *St.* 1786, *c.* 67; and a record of the establishment of such a way cannot, it seems, be presumed from a user for any length of time. *Ibid.*

36. When the question is of the real subject matter of a suit, in order to show a bar to another suit, or to lay the foundation of an action of indemnity, the identity of the cause of action may be averred, and may be proved by other than record evidence. *Parker* v. *Thompson.* 429

37. By a contract made in this State, A engaged "to repay to B, of New Hampshire, any moneys, not exceeding 1500 dollars, which B should legally be compelled to pay to C on account of money received of C on account of and in part pay for money due on D's bond to B." C recovered of B, in an action brought in New Hampshire, a larger sum than 1500 dollars *Held*, that the words *legally compelled* meant compulsion by legal process, without reference to the laws of any particular State; that as the particular ground of the recovery in C's action did not, and was not required to appear by the record of the judgment, it might be shown by parol evidence; and that the measure of damages, in an action on A's contract, should be the 1500 dollars, with interest from the time of a demand made subsequently to the recovery against B. *Ibid.*

38. When a witness, being asked whether he is interested in the suit, declares that he has parted with his interest, and without further question is allowed to testify in chief, a new trial will not be granted because the deed of transfer or a release was not exhibited. *Baxter* v. *Rodman.* 435

See Bills of Exchange &c., 8, 9, 17.
By-Law, 3, 4, 5, 6.
Deed, 3, 4, 5.
False Pretences, 1.
Gaol, 3, 4, 5.
Usury.

EXCEPTIONS.

1. Exceptions to the instructions of the Court of Common Pleas to the jury may be alleged for the first time, after the verdict is returned. *Semble.* *Buckland* v. *Charlemont* 173

2. If a case is brought before this Court by exceptions to the directions of the Court of Common Pleas, and this Court refuses to take cognizance of the exceptions, it is competent to the Court of Common Pleas to bring the case forward by entering the continuances, and to enter up judgment. *Commonwealth* v. *Moore.* 194

3. Upon *certiorari* it will be presumed, in favor of such judgment, that the case was not brought forward

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without notice to the party who took the exceptions, nothing to the contrary appearing on the record *Ibid.*

4 Where each party files his exceptions to the direction of the Court of Common Pleas, and the exceptions are overruled and the judgment affirmed, each is entitled to his costs. *Shattuck* v. *Woods.* 267

EXECUTION.

1. Two or more rights in equity of redeeming several parcels of land from several mortgages, when sold on one execution, ought to be sold separately and not for a gross sum; for the debtor has a right to redeem one equity sold, without redeeming the others; but a joint sale cannot be avoided by a stranger. *Fletcher* v. *Stone.* 250

2. An execution levied on land must be returned into the clerk's office in order to complete the title of the creditor; but if it has been returned before it is offered in evidence of such title, although after the return day, it will be sufficient. *Prescott* v. *Pettee.* 331

EXECUTOR AND ADMINISTRATOR

1. In stating as a breach of an administration bond, that the administrator did not inventory land which the intestate, in his lifetime, to defraud his creditors, conveyed to the administrator, *it seems* it should be averred that the administrator was a party to the fraud or had knowledge of it. *Newcomb* v. *Wing.* 168

2 A suit in the name of the judge of probate upon the bond of an administrator of an insolvent estate, for not inventorying real estate fraudulently conveyed by the intestate, cannot be sustained for the benefit of an individual creditor; but if the administrator, upon notice, does not get license to sell such estate, or otherwise account for it, the judge may sue the bond for the benefit of all the creditors *Ibid.*

3. Where an administrator pays a debt in full, upon an erroneous belief that the estate of his intestate is solvent, an action to recover back part of the money paid does not accrue until the insolvency of the estate is ascertained by a decree of insolvency and order of distribution; and consequently the statute of limitations begins to run from that time. *Walker* v. *Bradley.* 261

4. A demand of repayment was made after such decree, and interest was allowed only from the time of such demand. *Ibid.*

5. More than twenty years after a distribution of an insolvent estate had been made and the account of the administratrix been settled, she received of the government of the United States, under the treaty with Spain of February 22, 1819, a sum of money, as an indemnity for the loss of property taken from the intestate by Spanish cruisers. Being cited by the judge of probate to account for this money, she refused, and the judge, upon the application of a creditor whose claim had been allowed by the commissioners of insolvency, authorized an action to be brought upon her administration bond. *Held*, that the action lay *White* v. *Swain.* 365

See GAMING.
PRACTICE, 1.

FALSE PRETENCES.

1. In an action on the case in the nature of a conspiracy against three for obtaining goods upon credit by false and fraudulent representations, evidence that such representations were made by one alone in pursuance of a previous agreement and confederacy to that

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effect with the other two, but in their absence, will sustain a declaration charging them all with having made the representations. *Livermore* v. *Herschell.* 33

2. A judgment on the merits in such action is conclusive on the parties, and is a bar to any new action in a different form. *Ibid.*

FEME COVERT

See HUSBAND AND WIFE. INFANT, 2

FEOFFMENT

See DEED, 10.

FORCIBLE ENTRY.

1. Whether an entry on land by virtue of an extent, although the execution be extended on the land of a person not a party to it, will sustain a process of forcible entry and detainer, *quære.* *Commonwealth* v. *Bigelow.* 31

2. The possession of a tenant at will is not the possession of the lessor so as to enable him to maintain forcible entry and detainer against a stranger for expelling the tenant. *Ibid.*

3. Where a writ of restitution in a process of forcible entry has been executed, and the proceedings are afterwards quashed upon *certiorari*, this Court have power to award a writ of re-restitution. *Ibid.*

FOREIGN ATTACHMENT

See TRUSTEE PROCESS.

FRAUDS, STATUTE OF.

1 The clause in *St.* 1788, *c.* 16, (of frauds,) requiring a memorandum &c. in writing, applies to a mere promise by one to pay money to another, as well as to a mutual agreement where each party stipulates to do something. *Cabot* v. *Haskins* 83

2. At the foot of a mortgage deed, which was not accompanied by any note or bond, and which proved, owing to a prior mortgage, to be of no value, a memorandum was written, with the assent of the mortgagers, by the attorney of both parties, and signed by the mortgagees only, stating that the sum due on the mortgage was reduced to 1000 dollars, payable in five years It was *held*, that the signature of the mortgagers to the deed could not relate to the memorandum, and that this was not a writing signed &c. within the statute of frauds, sufficient to charge them for the 1000 dollars. *Ibid*

See SALE.

FRAUDULENT CONVEYANCE.

1. A husband conveyed his life estate in his wife's land to her father, who afterwards, being insolvent, reconveyed it to the wife, to prevent its being taken by his creditors; one of whom nevertheless extended an execution on the land. It was *held* that parol evidence was inadmissible to prove that the conveyance to the wife's father was in trust for her use; so that the reconveyance was taken to be fraudulent as against creditors. *Smith* v. *Lane.* 205

2. Where a debtor in failing circumstances agreed to convey furniture in part payment of a debt, and at the same time stipulated with the creditor to have a lease of it for a year, and the transfer and lease were accordingly made, it was *held*, that this was not conclusive evidence that the sale was fraudulent as against other creditors. *Wheeler* v. *Train.* 255

3. Such vendee cannot, pending the lease, maintain replevin, nor any other action, against an officer who attaches the furniture as the property of the lessee *Ibid*

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FREIGHT.

1. Freight is the compensation for the carriage of goods, and if it be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary. *Griggs* v. *Austin.* 20
2. Such an agreement cannot be implied, in case the goods should be lost by shipwreck, from the clause in the bill of lading, that they are to be delivered safely, the danger of the seas excepted, the design of that clause being only to save the master and ship-owner from being answerable for the value of the goods so lost. *Ibid.*
3. Payment of freight beforehand and an advance of freight mean the same thing, and whether the whole or a part only be paid, is immaterial, as it respects the right to recover it back. *Ibid.*
4 An agreement that the freight shall be no longer at risk after the goods shall have been received on board, cannot be implied from the mere fact of its having been paid in advance. *Ibid.*

GAMING.

All gaming is unlawful; and money lost at gaming, whether by fair or by foul play, cannot be recovered back by the loser, nor by his executor or administrator, in an action commenced after three months from the losing. *Babcock* v. *Thompson.* 446

See INDICTMENT, 2, 3.

GAOL.

1. A demand by a gaoler, pursuant to *St.* 1821, *c.* 22, of security for the board of a person committed on mesne process or execution, needs not be made in any precise form; it is sufficient if it is understood by the creditor, &c. *Blood* v. *Austin* 254
2. If the debtor represent himself to the gaoler as a pauper and claim support, it is a sufficient "claim of relief as a pauper" under that statute, without any application to the overseers of the poor. *Ibid.*
3. A notification to a creditor that his debtor intends to take the benefit of *St.* 1787, *c.* 29, [see Revised Stat. *c.* 98,] for the relief of poor debtors, cannot be avoided by showing that it was signed in blank by the justice of the peace, and while he was out of the commonwealth, was filled out and served. *Haskell* v. *Haven.* 404
4. The certificate of the two justices of the peace who administer the poor debtor's oath, that the return of such notification is conformable to law, cannot be contradicted by extrinsic evidence. *Ibid.*
5. The acts of such justices, where they have no jurisdiction, may be avoided by plea or evidence. *Ibid*

GENERAL FIELD.

See PARTITION.

GRANT.

See DEED.
ESCHEAT.
PARISH, 1, 2
WAY, 6.

GUARDIAN.

See LEGACY, 3.

HUSBAND AND WIFE

1 Upon the trial of an indictment against a married woman for larceny, evidence that her husband deposited a sum of money to procure the absence of a witness on the part of the government is inadmissible, unless it is shown that

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she was privy to the transaction. *Commonwealth* v. *Robbins*. 63

2. Where a husband turns away his wife for the cause of her adultery, he is not liable on her contracts made with persons having notice that he has discarded her. *Hunter* v. *Boucher*. 289

3. Whether the want of such notice, or a divorce refused on the ground of like criminality on the part of the husband, would make any difference, *quære*. *Ibid.*

4. A divorce will not be granted for adultery of the wife committed through the husband's procurement. *Pierce* v. *Pierce*. 299

5. Where a man dies *testate* and *solvent*, and his widow waives her rights under the will, she is not entitled to an allowance by the judge of probate, of a portion of the personal estate of the deceased. *Currier, Appellant &c.* 375

6. The *St.* 1816, *c.* 84, entitling a widow to one third part of the rents and profits of land of which she is dowable, until her dower shall be assigned, was not intended to give her a remedy against any person except the heirs of her husband. *Semble*. *Gibson* v. *Crehore*. 475

See DEED, 10.

INDICTMENT.

1. In an indictment for letting a house to a woman of ill-fame, to be used for purposes of prostitution, the time when such contract is alleged to have been made, is immaterial. *Commonwealth* v. *Harrington*. 26

2. An indictment against an innholder for suffering persons "to play at cards and other unlawful games," is sufficiently certain, the word *cards* being used in the statute as the name of a game, and the words "other unlawful games" being surplusage. *Commonwealth* v. *Bolkom*. 281

3. In such indictment it is not sufficient to allege, that the defendan was duly licensed and that he allowed persons to play in his inn, but it must be directly averred that he actually kept an inn. *Ibid.*

INFANT.

1. Where a minor son makes a contract for his services on his own account, and his father knows of it and makes no objection, there is an implied assent that the son shall have his earnings; so that, unless there is a design to defraud the father's creditors, the son's employer will not be liable in a process of foreign attachment as the father's trustee. *Whiting* v. *Earle and Trustee*. 201

2. Petition by *prochein ami* of an infant feme covert for the sale of real estate granted, and the proceeds ordered to be secured for her benefit. *Dagget, Petitioner &c.* 280

3. An infant, who hires a horse to go to a place agreed on, but goes to another place in a different direction, is liable in *trover* for an unlawful conversion of the horse. *Homer* v. *Thwing*. 492

INN AND INNHOLDER.

Any building used for the common purposes of an inn, and situated within its curtilage, is a "dependency" of such inn, within the meaning of *St.* 1786, *c.* 68. *Goff* v. *Fowler*. 300

See EVIDENCE, 11, 12.
INDICTMENT, 2, 3.
LIBEL, 5

INSURANCE.

1. By the terms of a policy of insurance the underwriters were not to be liable for a partial loss on grain, &c., unless the damage should happen by stranding or bilging. In a hurricane the ship was thrown on

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her beam ends, and in consequence of excessive straining her seams opened, whereby a great quantity of water was let into the ship, but no fracture was made in her bottom. *Held*, that this was not a bilging within the meaning of the policy. *Ellery v. Merchants Insurance Company*. 46

2. Whether what constitutes a bilging be a question of law or of fact, *quære*. *Ibid.*

3. Insurance was made on goods, the produce of the United States, on board an American vessel "at and from Boston to St. Pierre's Miquelon, at and from thence to Boston, with liberty to proceed to St. John's, Newfoundland." The assured went to St. Pierre's, where he sold part of the goods, and with the residue he proceeded to St. John's, not knowing that such voyage was prohibited, and there the property was seized and condemned because it had not been brought directly from the United States. It was *held*, that the loss was not covered by the policy, the terms being general, and it not being known to the insurer that an illicit voyage was intended to be insured. *Archibald* v. *Mercantile Insurance Company*. 70

4. An insurance broker, who receives premiums and pays losses, has a lien on the policies and abandonments in his hands, for a general balance against the underwriter. *Moody* v. *Webster*. 424

5. Where the underwriter became a bankrupt, and the insurance broker, having a balance due to him for losses paid, did not present his claim under the commission of bankruptcy, but retained in his hands the policies and abandonments, and afterwards, as a remuneration for the losses, a sum of money was paid, under the treaty with Spain of February 1819, to a third person for the benefit of all parties interested, it was *held*, that the insurance broker had a lien on such sum. *Ibid.*

INTEREST.

See ADVANCEMENT.
EXECUTOR &c., 4.

JOINDER IN ACTION

See SHIPS &c., 3.

JUDGMENT

See ENTRY, WRIT OF.
EVIDENCE, 15.
FALSE PRETENCES, 2.

JURISDICTION.

See JUSTICE OF THE PEACE, 3, 4.
PRACTICE, 2.

JUSTICE OF THE PEACE.

1. A notification to a creditor that his debtor intends to take the benefit of *St.* 1787, *c.* 29, [see Revised Stat. *c.* 98,] for the relief of poor debtors, cannot be avoided by showing that it was signed in blank by the justice of the peace, and while he was out of the commonwealth, was filled out and served. *Haskell* v. *Haven* 404

2. The certificate of the two justices of the peace who administer the poor debtors' oath, that the return of such notification is conformable to law, cannot be contradicted by extrinsic evidence. *Ibid.*

3. The acts of such justices, where they have no jurisdiction, may be avoided by plea or evidence. *Ibid.*

4. The provision in *St.* 1821, *c.* 109, § 6, [see Revised Stat. *c.* 87, § 3,] that the justices of the Police Court of Boston shall, under the appellation of The Justices' Court for the County of Suffolk, have original, exclusive jurisdiction and cognizance of all civil suits and actions which before might have been heard

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and determined by any justice of the peace of that county, is not unconstitutional, neither as interfering with the power of the governor to appoint all judicial officers, nor as abridging the constitutional powers of justices of the peace, nor because it depended for its force upon the contingency of the acceptance by the inhabitants of Boston of the act establishing the city of Boston, nor because its application was not general to the justices of the peace in all the counties in the commonwealth. *Wales* v. *Belcher*. 508

LADING, BILL OF.

See ASSIGNMENT.
FREIGHT, 2.

LARCENY.

See PAYMENT.

LEASE.

See ACTION.
FRAUDULENT CONVEYANCE, 2, 3.

LEGACY.

1. S makes a will, bequeathing legacies "to the two oldest children" of M. One of the two oldest at the date of the will dies. S afterwards by a codicil confirms the will, except in some particulars, saying nothing of these bequests. *Held*, that the two oldest children living at the testator's decease, were entitled to the legacies. *Miles* v. *Boyden*. 213
2. An action for a legacy will not lie until after a demand by the legatee upon the executor *Ibid.*
3. A father, as natural guardian, is not entitled to demand or receive payment of a legacy to his child; but where a demand by him was resisted by the executor, solely on the ground that the child had no claim to the legacy, it was *held*, that the executor had waived the necessity of a demand, and an action by the legatee by his father as *prochein ami* was sustained. *Ibid*

See DEVISE, 2, 3.

LEGISLATURE.

1. The legislature have authority to enact, that the interest which an inhabitant of a city may have in a penalty for the breach of a by-law thereof, shall not disqualify him to act as a judge, juror, or witness, in a prosecution to recover such penalty. *Commonwealth* v. *Worcester*. 462
2. An act of the legislature, providing that in prosecutions on the by-laws of Boston, it shall not be necessary to set forth the by-law at large in the complaint, is not unconstitutional as conferring an exclusive privilege. *Ibid.*
3. So of *St.* 1817, *c.* 50, providing that such prosecutions may be in the name of the commonwealth; and that statute is not repealed by the act by which the town of Boston was incorporated as a city. *Ibid.*
4. A member of the house of representatives can, constitutionally, be elected to a seat in the council. 517
5. The constitution allows the filling of a vacancy in the house of representatives, which has been occasioned by the election of one of its members into the senate or council. *Ibid.*

See JUSTICE OF THE PEACE, 4.
PARISH, 1, 2.

LEX DOMICILII

See ADMINISTRATION, 1, 2, 3.

LEX LOCI.

See BILLS OF EXCHANGE &c., 3

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LIBEL.

A libel was published in a newspaper printed in another State, but which usually circulated in a county in this State, and the number containing the libel was actually received and circulated in such county. *Held*, that this was competent and conclusive evidence of a publication within such county. *Commonwealth* v. *Blanding*. 304

2. The malicious intent charged in an indictment for a libel, where the truth of the facts contained in the libel is not admitted in evidence, is an inference of law. *Ibid.*
3. The provision in the constitution securing the liberty of the press, was intended to prevent any previous restraints upon publications, and not to affect prosecutions for the abuse of such liberty. *Ibid.*
4. The general rule is, that upon indictment the truth of a libel is not admissible in evidence. Whether in any particular case such evidence is admissible, is to be determined by the court; and if admitted, the jury are to determine whether the publication was made with good motives and for justifiable ends. *Ibid.*
5. On an indictment for a libel published in a newspaper, charging a person with misconduct as an innkeeper, for which he was liable to punishment, it was *held*, that the truth of the libel was not admissible in evidence. *Ibid.*
6. Publishing a correct account of a judicial proceeding, but with comments and insinuations tending to asperse a man's character, is libellous. *Ibid.*
7. A false complaint, made with express malice, or without probable cause, to a body having competent authority to redress the grievance complained of, may be the subject of an action for a libel; and the question of malice is to be determined by the jury. — So *held*, in the case of a letter from an inhabitant of a school district to the school committee, accusing the schoolmistress of a want of chastity. *Bodwell* v. *Osgood*. 379
8. The deliberate publication of a calumny, when the publisher knows it to be false, or has no reason to believe it to be true, is conclusive evidence of malice. *Ibid.*
9. In an action for a libel, evidence of the defendant's procuring depositions, &c. to prove the truth of his charges, and afterwards declining to plead a justification, may be properly referred to the jury on the question of malice, but not on the question of damages. *Ibid.*
10. In such an action brought by a schoolmistress against a man of wealth and influence, for accusing her of want of chastity, the verdict was for 1400 dollars; and the Court refused to grant a new trial on the ground of excessive damages. *Ibid*

See EVIDENCE, 29, 30, 31

LICENSE.

A license granted by the Court of Sessions is valid, and will protect the person licensed, notwithstanding the anterior proceedings may have been irregular. *Goff* v. *Fowler*. 300

See EVIDENCE, 11, 12.

LIEN.

1. An insurance broker who receives premiums and pays losses, has a lien on the policies and abandonments in his hands, for a general balance against the underwriter *Moody* v. *Webster*. 424
2. Where the underwriter became a bankrupt, and the insurance broker, having a balance due to him for losses paid, did not present his claim under the commission of bankruptcy, but retained in his

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hands the policies and abandonments, and afterwards, as a remuneration for the losses, a sum of money was paid, under the treaty with Spain of February 1819, to a third person for the benefit of all parties interested, it was *held*, that the insurance broker had a lien on such sum. *Ibid.*

See SALE.
SHIPS &c., 1.

LIMITATIONS, STATUTE OF.

1. To a plea of the statute of limitations in an action to recover back money paid, it is a good replication, that the money was paid in consequence of a fraudulent concealment on the part of the defendant, and that the plaintiff did not discover the fraud until within six years before the commencement of the action. *Welles* v. *Fish.* 74
2. Where an account between merchants has been balanced, and a balance carried forward, it is no longer an open and running account, and the parties cannot go behind such settlement, without leave obtained upon a bill in chancery, to inquire whether the balance is founded in error. Thus, the usage of a bank was, at the end of every month, to balance the bank book of a depositor and make the balance the first item in a new account, and to restore to the depositor the checks drawn by him during the month; and it was *held*, that the bank could not go behind any such settlement, and that the statute of limitations begins to run, as to any such balance, from the time of so stating the account. *Union Bank* v. *Knapp.* 96
3. Where an administrator pays a debt in full, upon an erroneous belief that the estate of his intestate is solvent, an action to recover back part of the money paid does not accrue until the insolvency of the estate is ascertained by a decree of insolvency and order of distribution; and consequently the statute of limitations begins to run from that time. *Walker* v. *Bradley.* 261
4. An acknowledgment of a debt barred by the statute of limitations, by one of several joint debtors, is sufficient to take the case out of the statute as against all. *White* v. *Hale.* 291

See EVIDENCE, 1.

MARRIAGE AND DIVORCE.

A divorce will not be granted for adultery of the wife committed through the husband's procurement. *Pierce* v. *Pierce.* 299

See EVIDENCE, 16, 17.

MEETINGHOUSE.

See PARISH, 11.

MILITIA.

1. The appointment of a member of a volunteer company in the militia to be an engine-man, exempts him from militia duty, but does not discharge him from his enlistment, and if he ceases to be an engine-man before the expiration of the term of the enlistment, his liability to do duty in such company revives. And this liability will not be affected by his enlisting, while so exempted, in another volunteer company, and receiving a non-commissioned officer's warrant therein. *Hamilton* v. *Shepherd.* 226
2. C. J. H. was enrolled in a company of militia by the name of C. H. *Held*, that he was not duly enrolled. *Commonwealth* v. *Hall.* 262
3. On the back of a sergeant's warrant was a certificate, that he had "taken and subscribed the oath according to law before me, J. T. W. commanding officer." *Held*,

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that this was not a sufficient certificate of his being appointed clerk of the company, and that it could not be amended by inserting proper words of appointment, to sustain a prosecution commenced by him as clerk. *Ibid.*

4. A person subject to militia duty, living within the limits of one brigade, cannot lawfully enlist in a volunteer company in another brigade. *Webber, Petitioner &c.* 264

5. A private in a company of militia, who is excused for a term of time, upon a surgeon's certificate, from performing military duty, on account of bodily infirmity, is not thereby excused from attending at meetings for the choice of officers of the company. *Smith, Petitioner &c.* 386

6. The *St.* 1809, *c.* 108, § 1, exempting schoolmasters from militia duty, extends to masters of private schools. [See Revised Stat. *c.* 12, § 5.] *Stacy* v. *Lyon.* 390

7. A member of a volunteer company raised within the limits of the brigade within whose limits he resides, is required to produce to the commanding officer of the standing company within whose limits he resides, a certificate, pursuant to *St.* 1825, *c.* 153, § 4, that he does active duty in such volunteer company, and keeps himself properly armed, equipped, and uniformed. *Thayer* v. *Stacy.* 506

MILLS.

The owner of land bordering on a stream has no right to divert the water for the purposes of irrigation, and thereby diminish the quantity which has been accustomed to flow to a mill of forty years' standing, so as to impede its operation. *Cook* v. *Hull.* 269

See ACTION.
DEED, 7, 8.

MINISTER OF THE GOSPEL

See PARISH, 1, 2, 10.

MISDEMEANOR.

1. Exciting, encouraging, and aiding a person to commit a misdemeanor, is of itself a misdemeanor. *Commonwealth* v. *Harrington.* 26

2. Thus, letting a house to a woman of ill fame, knowing her to be such, with the intent that it shall be used for purposes of prostitution, is an indictable offence at common law *Ibid*

MISNOMER.

See MILITIA, 2.
WILL, 3.

MORTGAGE.

1. Where a right in equity of redeeming mortgaged real estate is sold on execution to a creditor of the mortgager, the mortgager is entitled to redeem such right in equity upon re-payment of the purchase money and interest, without paying other demands of the purchaser against him. *Loring* v. *Cooke.* 48

2. A tender of the purchase money must be unconditional; and where the mortgager offered the money, but insisted on the purchaser's executing a release of the right in equity, which he refused to do, the tender was held insufficient. *Ibid.*

3. Where a mortgagee recovered in a writ of entry against a stranger, the judgment rendered was conditional. *Somes* v. *Skinner.* 52

4. Where a mortgagee of a reversion of an estate in dower entered after condition broken, but not before, it was held that he might maintain an action against the tenant for life for waste committed before the breach of the condition. *Fay* v. *Brewer.* 203

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5 Two or more rights in equity of redeeming several parcels of land from several mortgages, when sold on one execution, ought to be sold separately and not for a gross sum; for the debtor has a right to redeem one equity sold, without redeeming the others; but a joint sale cannot be avoided by a stranger. *Fletcher* v. *Stone*. 250

6. When the purchaser of an equity of redemption takes an assignment of the mortgage, it shall or shall not operate as an extinguishment of the mortgage, according as his interest may be, and according to the real intent of the parties. *Gibson* v. *Crehore*. 475

7. A gives his promissory note to B, with a mortgage of land as collateral security, his wife, the plaintiff, releasing her right of dower. A dies insolvent, and after condition broken, his administrators sell the equity of redemption to the defendant, who gives them a bond obliging himself to pay the debt to B, and enters into immediate possession. He accordingly pays that debt, and takes from B an assignment of the mortgage; and then mortgages the land to C. After this he makes a declaration in the presence of two witnesses, that he holds for condition broken, in order to foreclose the mortgage to B, giving no express notice to the plaintiff, and he continues in possession thereafter for three years. *Held*, that the payment of the debt to B, and the assignment, did not operate as an extinguishment of the mortgage so as to let in the widow to her dower; and that if her right of dower in the equity of redemption was not barred by the three years' possession, her remedy was by a bill in chancery, and not by an action under *St.* 1816, *c.* 84, for a third part of the rents and profits *Ibid.*

8. Land mortgaged cannot be attached on mesne process for the debt of the mortgagee, before he shall have entered on the same, nor, *it seems*, before foreclosure. *Eaton* v. *Whiting*. 484

9. A conveyance of land, on condition that if a debt due from the grantor to the grantee shall be paid within a certain time, the deed shall be void, with a power to the grantee, in case the debt shall not be so paid, to sell the land and apply the proceeds to the extinguishment of the debt, and pay over the surplus to the grantor, constitutes a mortgage, until the power shall be executed. *Ibid.*

See FRAUDS, STATUTE OF, 1, 2

NEW TRIAL.

See LIBEL, 10

NON COMPOS MENTIS.

See SETTLEMENT, 1. 2

NOTICE.

See BILLS OF EXCHANGE &c., 6, 7, 18 DEED, 3, 4, 5.

PARISH.

1. Land given to a town for the use of "the ministry," may, with the leave of the legislature and the consent of all parties interested, be appropriated to the support of several ministers settled over distinct portions of the inhabitants of the town, the original purpose of the grant being preserved by such a disposition of the property. *Humphrey* v. *Whitney*. 158

2. Thus, in 1741, the legislature granted to individuals a township of land, part of it to be reserved for the use of the ministry. In 1764, the grantees settled their first minister, who was of the Congregational order, and who entered on the ministerial land, and occupied it until 1797. In that year the legis-

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ature, in pursuance of a vote of the inhabitants of the town, including Christians not of the Congregational order, passed a resolve, authorizing this land to be sold by the minister and selectmen, and the income of the proceeds to be applied annually for ever, in certain proportions, to the support of the ministers of the Congregational society, and of a Protestant Episcopal society then existing, but not incorporated until 1823. The land was sold and the income applied accordingly until 1824, when the members of the Congregational society organized themselves as the first parish, and forbade any part of the income to be paid to the minister of the Episcopal society. *Held*, that the resolve was not unconstitutional, and that such minister was entitled to recover his stipulated proportion. *Ibid.*

3 A parish, as well as a town, is capable of taking and holding a devise to be applied to the use of schools. *First Parish in Sutton* v. *Cole.* 232

4 Where the record of a parish meeting shows it to have been called by the warrant of a justice of the peace, under *St.* 1786, *c.* 10, § 2, and to have been regularly warned, no exception to the authority of the magistrate appearing on the record, neither a stranger, nor, *it seems*, an inhabitant of the parish, will be allowed to question the legality of the meeting, on the ground that the application to the magistrate was signed by fewer than ten persons, or that some of the signers were not qualified voters. But *it seems* that such irregularities, if excepted to by the inhabitants at the meeting, would render the proceedings of the meeting void. *Ibid.*

5 So if persons who are not qualified voters, do in fact vote at a parish meeting without being challenged, no one can take advantage of such irregularity to vacate the proceedings. *Ibid.*

6. So a parish meeting called by persons acting as a committee of the parish, under color of a regular appointment, will be held legal, if no exception to their authority is taken at the meeting. *Ibid.*

7. A vote of a parish "to take measures to obtain possession" of a devise, and another "to choose agents to institute or defend any suit or suits, and act any thing relative thereto," will authorize the agents to make an entry on the land devised, previously to bringing a writ of entry. *Ibid.*

8. Where two agents are appointed by a parish to make an entry on land, an entry by one alone does not pursue the authority; but the parish may avail themselves of such entry by bringing their action upon it, which will be a ratification. *Ibid.*

9. Where a writ of entry was brought in the name of a parish, which had had no meeting for more than nine years before the commencement of the action, but the defendant pleaded to the merits, without contesting the authority of the attorney of the demandants, the action was sustained. *Ibid.*

10. Several inhabitants of a parish signed a subscription paper, binding themselves to pay or give their notes for the sums affixed to their names, to the parish treasurer, to constitute a fund, which was to be managed by the settled minister, treasurer and parish committee as a board of trustees, and the income to be devoted for ever to the annual support of a minister. The parish voted to accept the donations. The defendant, pursuant to the terms of the subscription paper, gave his promissory note, in which he acknowledged that he had borrowed and received the sum subscribed by him of the parish treasurer, and promised to repay the same to such

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treasurer or his successor, according to the conditions of the donation, with interest annually, and for several years he did pay the interest. *Held*, that a sufficient consideration for the promise was stated in the note, which the defendant could not contradict; that the parish might maintain an action on such note in the name of the treasurer for the time being; and that the trustees, in case of their neglect, might be compelled by a bill in chancery to appropriate the fund according to the intention of the donors. *Fisher* v. *Ellis*. 322

11. A parish has a right to take down a meetinghouse in order to rebuild, without conforming to the provisions of *St.* 1817, *c.* 189; that statute not being intended to apply to parishes, but only to other proprietors of churches, &c. *Wentworth* v. *First Parish in Canton*. 344

PARTICULARS, BILL OF.

1. A bill of particulars should give as much information as a special declaration, so that the defendant may know the real ground of the action. *Babcock* v. *Thompson*. 446
2. It is amendable like a declaration. *Ibid.*
3. If it is insufficient, or not attempted to be supported by proper evidence, a nonsuit may be ordered. *Ibid.*

PARTITION.

1. Under *St.* 1783, *c.* 39, § 8, the proprietors of common and undivided land may make a valid partition by vote, and without any instrument under seal. *Folger* v *Mitchell*. 396
2. Pursuant to votes, such proprietors laid out several large tracts of land, each into 27 equal parcels, and having arranged themselves into 27 classes as nearly equal in interest as might be, assigned by lot to each class one parcel of each tract, to be held in common by the members of the class and to the exclusion of the other proprietors. *Held*, that such partition was valid. *Ibid.*
3. If in a partition the parcels of land are made certain by the metes and bounds referred to, an error in the courses and distances stated will be immaterial. *Ibid.*
4. A partition under *St.* 1783, *c.* 39, will be valid, notwithstanding that in some instances the shares are assigned to the heirs, sons, &c. of A, B, &c. without naming the assignees except by words of description. *Ibid.*
5. If such proprietors appoint a committee to survey a tract of land, and to lay it out in lots preparatory to a partition, they may either assent to the doings of the committee, or make partition without regard to them; so that if only a part of the members of the committee should act, and the proprietors should ratify their doings and make partition accordingly, the proceedings would be valid. *Ibid.*
6. If a petition for partition is discontinued, it will not defeat a voluntary partition made by the proprietors themselves while it was pending *Ibid.*

PARTNER.

1. Where a note is given in the name of a firm, by one of the partners, for the private debt of such partner, and known to be so by the person taking the note, the other partners are not bound, unless they have been consulted and have consented to the transaction. *Chazournes* v. *Edwards*. 5
2. The principle, that after a partnership is dissolved, one partner, dealing with a person who has no notice of the dissolution, may bind his copartner, applies only to transactions in the usual course of

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business. *Whitman* v. *Leonard.* 177

3. Thus, where a partner having absconded, his copartner told the holder of a note against them not then due, that they were going to fail, and renewed the note in the name of the firm, making it payable on demand, in order that the creditor might secure himself, it was *held*, that this note did not bind the absconding partner, notice of the dissolution being either not necessary or being implied by the transaction itself. *Ibid.*

4. Though a tenant in common or partner may now have relief in equity against his cotenant or copartner, under *St.* 1823, *c.* 140, yet if the joint interest is determined or the partnership dissolved, all accounts and liabilities being settled and discharged, and a balance remains due from one cotenant or copartner to another, it may be recovered in an action of *assumpsit*, and without any express promise. *Fanning* v. *Chadwick.* 420

5. The plaintiff and defendant being part owners of a vessel, of which the defendant was master, and being jointly concerned in a whaling voyage undertaken by such vessel, the defendant, in the course of the voyage, landed some prisoners from a privateer, and also saved some articles from a wreck; for each of which services he received a compensation. On his return he settled up the voyage, but without rendering any account of these two items of compensation. *Held*, that the plaintiff might recover her proportion of the same in the form of *assumpsit*. *Ibid.*

See AMENDMENT, 2.
LIMITATIONS, STATUTE OF, 4.
PRACTICE, 10.
SHIPS &c., 3

PAYMENT.

A clerk of a bank stole, from the drawer of another clerk, bills belonging to the bank, which he delivered over to the cashier, and which the cashier, not knowing they had been thus stolen, accepted in discharge of the balance due from such clerk to the bank. *Held*, that this was no payment. *State Bank* v. *Welles.* 394

PLEADING.

1. Trespass *de bon. asp.*; plea, property in one S, and not in the plaintiff, and justifying as deputy sheriff; replication, *de sud injuriâ*, and traversing that the property was in S; rejoinder, that it was in S; issue, and verdict of guilty. *Held*, that the issue was immaterial, and a repleader ordered. *Held*, also, that the plea, even if it amounted to the general issue, was well enough, not being specially demurred to, and that the first fault was in the replication, in not taking issue on the traverse in the plea. *Gerrish* v. *Train.* 124

2. If the court are at a loss how to give judgment, a repleader will be awarded on the motion of either party. *Ibid.*

3. In an action of replevin brought by a lessor of goods against an officer who has attached them, a plea by the officer that the property was in the lessee when he attached it, without setting out his title specially, is good after verdict; and so (per *Wilde* J.) *it seems* upon demurrer. *Wheeler* v. *Train.* 255

4. In an action of *covenant* a plea of *non est factum* may be joined with a plea of payment. *Merry* v. *Gay.* 388

See BASTARD, 2, 3.
COSTS, 4.
EXECUTOR, &c., 1.
JUSTICE OF THE PEACE, 9

POOR.

See GAOL.
SETTLEMENT.

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PRACTICE.

1. An action was brought against two obligors in a joint and several bond. One died and his death was suggested on the record, and the action proceeded against the other. *Held*, that a separate action might be sustained against the executor of the deceased, while the first action was pending against the survivor. *State Bank* v. *Welles*. 15

2. In an action brought in a State court against a foreign consul, it did not appear by the plaintiff's own showing, nor upon a plea to the jurisdiction, that the defendant was a consul, but judgment was rendered upon a default; and on *scire facias* against the bail, it was *held*, that he could not take advantage of the want of jurisdiction in the original action. *Hall* v. *Young*. 80

3. In a prosecution under *St.* 1785, *c.* 66, § 2, for the maintenance of a bastard child, the complainant entered her complaint in the Court of Common Pleas by attorney, but pleaded by guardian; and upon *certiorari* after judgment it was presumed that she was of age, the contrary not appearing and not being inferrible from her pleading by guardian. *Commonwealth* v. *Moore*. 194

4. If a case is brought before this Court by exceptions to the directions of the Court of Common Pleas, and this Court refuses to take cognizance of the exceptions, it is competent to the Court of Common Pleas to bring the case forward by entering the continuances, and to enter up judgment. *Ibid.*

5. Upon *certiorari* it will be presumed, in favor of such judgment, that the case was not brought forward without notice to the party who took the exceptions, nothing to the contrary appearing on the record. *Ibid.*

6. Partnership property was attached upon a writ containing the names of three only out of four surviving partners, and the next day the name of the fourth was inserted, and a new attachment made upon the same property; but in the mean time another creditor had attached the property upon a writ against the four partners. *Held*, that the first attachment was vacated as against the second attaching creditor. *Denny* v. *Ward*. 199

7. The power of a *prochein ami* commences with the suit, and he can therefore maintain a suit for such causes of action only as may be prosecuted without a previous special demand; unless the defendant has waived the necessity of a demand. *Miles* v. *Boyden*. 213

8. Where a writ of entry was brought in the name of a parish, which had had no meeting for more than nine years before the commencement of the action, but the defendant pleaded to the merits, without contesting the authority of the attorney of the demandants, the action was sustained. *First Parish in Sutton* v. *Cole*. 232

9. Petition by *prochein ami* of an infant feme covert for the sale of real estate granted, and the proceeds ordered to be secured for her benefit. *Dagget, Petitioner &c.* 280

10. One of two joint plaintiffs, who had formerly been partners, having agreed that the action should be discontinued, the other made affidavit that the cause of action was a debt due to the partnership, and that the agreement was made to defraud him by collusion between his co-plaintiff and the defendant, and thereupon the Court refused to order a nonsuit. *Loring* v. *Brackett*. 403

11. An original writ prosecuted by an individual was indorsed thus — "A. B. by C. D., his attorney." — *Held*, that the attorney had thereby made himself responsible for the costs which the defendant should

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recover, and consequently had disqualified himself to be a witness on the part of the plaintiff. *Chadwick* v. *Upton and Trustees.* 442

See ABATEMENT.
AMENDMENT, 1, 2, 4
BY-LAW, 7, 8, 9.
DEPOSITION.
EXCEPTIONS, 1, 4.
FORCIBLE ENTRY, 3.
JUSTICE OF THE PEACE, 1, 2, 3
PARTICULARS, BILL OF.
PLEADING, 2, 4.

PRESS, LIBERTY OF THE.

See LIBEL, 3.

PRINCIPAL AND AGENT.

See PARTITION, 5.
PARISH, 6, 7, 8.
SHIPS, &c., 2, 4, 5, 6, 7, 8.

PROCHEIN AMI.

The power of a *prochein ami* commences with the suit, and he can therefore maintain a suit for such causes of action only as may be prosecuted without a previous special demand; unless the defendant has waived the necessity of a demand. *Miles* v. *Boyden.* 213

See PRACTICE, 9.

PROMISE.

1. The general position, that a moral obligation is a sufficient consideration for an express promise, is to be limited in its application to cases where a good or valuable consideration has once existed. *Mills* v. *Wyman.* 207
2. Thus, where a son, who was of full age and had ceased to be a member of his father's family, was suddenly taken sick among strangers, and, being poor and in distress, was relieved by the plaintiff, and afterwards the father wrote to the plaintiff promising to pay him the expenses incurred, it was *held*, that such promise would not sustain an action. *Ibid*

See CONSIDERATION.

RECORD.

See EVIDENCE, 36, 37.

REGISTRY.

See DEED, 3, 4, 5.

REPLEADER.

See PLEADING, 1, 2

REPLEVIN.

See FRAUDULENT CONVEYANCE, 3.

REPRESENTATIVES, HOUSE OF.

See LEGISLATURE, 4, 5.

REVIEW

See COSTS, 2.

RULE OF COURT.

See ABATEMENT.

SALE.

The defendant gave to L a bill of parcels of certain goods, and a certificate that he held them for L on storage. The bill was receipted, L having given his negotiable note for the amount. Afterwards L offered to cancel the contract, if the defendant would return the note, to which he agreed. The note was then in a bank, having been discounted for the defendant, but some days afterwards the defendant tendered it to L, and requested him to cancel the contract; but L had in the mean time assigned the goods to the plaintiffs, his creditors, informing them, however, of the conversation relative to cancelling

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the contract In *trover* by the assignees it was *held*, that the defendant was estopped to say he never had any such goods; that the property vested in L; that the defendant had no lien for the price of the goods; that the contract was not rescinded, it having been executed; and that there was no resale to the defendant, but at most only a conditional agreement to reconvey, which, not being in writing, &c., was void by the statute of frauds. *Chapman* v. *Searle*. 38

See MORTGAGE, 5.

SCHOOL AND SCHOOLMASTER.

See PARISH, 3.
MILITIA, 7.

SCIRE FACIAS.

See PRACTICE, 2.

SEA-SHORE.

See DEED, 9.

SETTLEMENT.

1. One who becomes *non compos mentis* after having come of age, does not follow the settlement of his father. *Buckland* v. *Charlemont*. 173
2. Incipient insanity does not incapacitate one for gaining a settlement. *Ibid.*
3. To gain a settlement under *St.* 1793, *c.* 34, [see Revised Stat. *c.* 45, § 1,] by having an estate of inheritance or freehold of the clear yearly value of ten dollars, and taking the rents and profits thereof three years successively, it is necessary that there should be an actual annual income, and that it should be each and every of the three years of the value of ten dollars. *Western* v. *Leicester*. 198

See EVIDENCE 16, 17

SHIPS AND SHIPPING

1. By the shipping articles of a whaling ship, the seamen were to have shares of the net proceeds of the oil to be obtained, in lieu of wages. According to the usage of that business, the master supplies the seamen, when abroad, with necessary clothing, and retains from their shares respectively the amount advanced; and this, whether they return in the ship or desert, and whether their shares are or are not assigned. *Held*, that this was a reasonable usage, and that the master, by putting the oil, marked with the ship's mark, on a wharf, whence part of it was taken by the plaintiffs, but afterwards returned, and by delivering it up to a general agent for settling the voyage to be sold, did not part with his lien. *Barney* v. *Coffin*. 115
2. Such seamen, after assigning their shares, forfeited them by desertion, but the ship-owners nevertheless authorized their agents to pay the shares to the assignee, making deductions for the expenses of procuring other seamen; and the agents gave the assignee a written promise, upon which they were afterwards held personally liable to pay him the shares. Whereupon they brought an action of *assumpsit* in their own names against the master, to whom such shares had been paid over by the general agent for settling the voyage, and the action was sustained for the balance after deducting the amount of the master's advances. *Ibid.*
3. The master and crew of a ship engaged on a whaling voyage, who are to receive, in lieu of wages, a proportion of the net proceeds of the oil which shall be obtained, are not partners with the owners of the ship, and need not be joined in an action brought by the owners to recover of a third person a part of such oil *Baxter* v. *Rodman*. 435

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4. By a usage in the whaling business, masters of ships meeting at sea sometimes enter into a contract of *mateship;* so that if the ships cruise together, they divide equally the oil obtained, before they separate; if they cruise separately, they make an equal division upon their first meeting afterwards; if the ships accidentally separate and do not meet again, neither can claim of the other, if one returns home full; but if they do meet abroad, and neither has filled, the settlement and division take place immediately. *Held,* that this was a reasonable usage, and binding on the owners of the ships, where they do not prohibit the masters from making such contracts. *Ibid.*

5. Although it is usual in mateships, for the masters to make the division of the oil when at sea, yet if one of them refuses to deliver what is due from him, an action will be sustained, after the return of the ships, between their respective owners. *Ibid.*

6. The owner of a ship and cargo sent them to the West Indies, directing the master to sell the cargo, and bring or send home a return cargo, the principal object of the voyage being the freighting business among the islands, and also directing him to manage the voyage in such manner as in his opinion should be most advantageous. The master accordingly sold the outward cargo, and purchased a return cargo, but found no opportunity to send it home. It was *held,* that even if he might be justified in selling it again for the purpose of going into the freighting business, or with an ultimate view to a return cargo, yet that he was not authorized to sell it to a creditor of his owner for the purpose of paying the debt, notwithstanding such creditor threatened, in case of his refusal, to detain the vessel and cargo by legal process. *Peters* v. *Ballistier* 495

7. *Held,* also, that such a sale not being in the ordinary course of business, the owner was not left to his remedy against the master only but that he might disaffirm the sale. *Ibid.*

8. The value of the property thus sold being greater than the amount of the debt, the creditor paid the master the balance in money; and this balance was applied by an agent of the owner to the disbursements of other vessels which had belonged to him, but which had been transferred to the assignee of the bill of lading before mentioned. The assignee wrote to the creditor, claiming repayment of the amount of the debt, which was refused, and he then brought an action of *assumpsit* to recover the same amount. That action he discontinued, and afterwards brought *trover* for the whole of the property sold to the creditor. *Held,* that the assignee had not affirmed the sale, but that it would have been otherwise, if he had not discontinued the action of *assumpsit*. *Held,* also, that *trover* lay for the whole property sold, but that the creditor might maintain an action against the assignee for the balance that had been paid to the master on a contract which failed, and had been expended for the benefit of the assignee. *Ibid.*

See ASSIGNMENT.
FREIGHT.
PARTNER, 5.

SLANDER.

See EVIDENCE, 29, 30, 31
LIBEL.

SPENDTHRIFT.

The *St* 1818, c. 60, which, in case a guardian shall be appointed to a spendthrift, avoids "every gift, bargain, sale, or transfer of any real or personal estate," made by the spendthrift after the complaint

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of the selectmen to the judge of probate and the order of notice thereon shall have been filed in the registry of deeds, does not apply to promissory notes. *Smith* v. *Spooner* 229

STAGECOACH.

See ATTACHMENT.

STATE PRISON.

The warden of the State prison brought an action, pursuant to *St.* 1813, *c.* 47, § 1, upon a contract relative to the employment of convicts within the prison, and died pending the suit. It was *held*, that neither his successor nor executor could be compelled to prosecute the suit, and that the defendant's remedy for his costs was by application to the legislature. *Bradford* v. *Rowe.* 17

STATUTE.

1. A statute of another State, or its repeal, cannot be proved by parol evidence. *Raynham* v. *Canton.* 293
2. A book purporting to contain the statutes of any one of the United States, and to be printed by its authority, is *primâ facie* evidence of the written law of such State. *Ibid.*
3. *Aliter* of a printed book of statutes of a foreign nation. *Semble. Ibid.*

See JUSTICE OF THE PEACE, 4. LEGISLATURE, 1, 2, 3.

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SURETY.

See Bills of Exchange, &c., 11. Bond, 4.

TENANT FOR LIFE.

See Waste.

TENDER.

See Bills of Exchange, &c., 12 Mortgage, 2.

TOLL.

See Way, 4, 5.

TOWN.

See Way, 1, 2, 3, 6, 7.

TRADE, RESTRAINT OF.

A bond, conditioned that the obligor shall give the obligee all the freighting of the obligor's goods up and down the Connecticut river, at the customary price, to be paid in goods at the usual price, and that he shall not encourage any other boatman to compete with the obligee in the business of boating, is not void as being in restraint of trade, and is founded on a sufficient consideration. *Palmer* v. *Stebbins*. 188

TRUST.

See Fraudulent Conveyance, 1. Parish, 10.

TRUSTEE PROCESS.

1. One summoned as trustee in a process of foreign attachment, disclosed that the principal defendant had covenanted to build a house for him, and that he had covenanted to pay such defendant certain sums at certain stages of the work; that he had generally paid before the instalments became due, but that he had no means of ascertaining whether at the time of the service of the writ the payments were in advance of the work or not. *Held*, that he should not be charged as trustee. *Harris* v. *Aiken and Trustees*. 1
2. A gave his note in payment for goods purchased by B through a broker, and took the goods to sell on commission as security for his liability. After he had sold them at a profit, but before he had received payment for them, B was summoned as the trustee of the broker, who was to have part of the net profit. *Held*, that he was not chargeable, it being contingent whether any net profits would ever come into his hands. *Williams* v. *Marston and Trustees*. 65
3. If after the service of a trustee process by leaving a copy the person summoned shall, *bonâ fide*, before actual notice of the service, make a payment, or give or accept a negotiable security in favor of the principal debtor, which shall have been negotiated before notice, he will be protected against the trustee process. *Semble*. *Ibid*.
4. *Aliter*, where he has reason to suppose such service has been made, and he nevertheless makes a payment, &c., with a view to assist the

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principal debtor in defeating his creditors of their debts. *Semble.* *Ibid.*

5 Where a minor son makes a contract for his services on his own account, and his father knows of it and makes no objection, there is an implied assent that the son shall have his earnings; so that, unless there is a design to defraud the father's creditors, the son's employer will not be liable in a process of foreign attachment as the father's trustee. *Whiting* v. *Earle and Trustee.* 201

6. A person who has never been an inhabitant or resident within this commonwealth, but who only comes here occasionally in the day time, is not liable to the trustee process. *Ray* v. *Underwood and Trustee.* 302

TURNPIKE ROAD.

See WAY, 2, 3, 4, 5.

USAGE.

See BILLS OF EXCHANGE, &c., 14, 15. SHIPS, &c., 1, 4, 5.

USE.

See DEED, 10.

USURY.

1. Where a contract is attempted to be avoided or enforced by the oath of a party, pursuant to *St.* 1783, *c.* 55, § 2, against usury, all the debtors or all the creditors must offer to swear, and if required, actually swear, respectively, that there was or was not usury. *Knights* v. *Putnam.* 171

2 Usury between the indorser and indorsee in the transfer of a promissory note, cannot be set up in defence to an action by the indorsee against the maker; consequently the indorser cannot be admitted as a witness to prove such usury. *Knights* v. *Putnam.* 184

VERDICT.

Trespass *de bon. asp.*; plea, property in one S, and not in the plaintiff, and justifying as deputy sheriff; replication, *de suâ injuriâ*, and traversing that the property was in S; rejoinder, that it was in S; issue, and verdict of guilty. *Held*, that the issue was immaterial *Held*, also, that the verdict was bad, being argumentative; but whether it was amendable, or cured by the statutes of jeofaile, *quære.* *Gerrish* v. *Train.* 124

See EVIDENCE, 15.

VOTER.

See PARISH, 4, 5.

WASTE.

1. Where a mortgagee of a reversion of an estate in dower entered after condition broken, but not before, it was held that he might maintain an action against the tenant for life for waste committed before the breach of the condition. *Fay* v *Brewer.* 203

2. A tenant for life is answerable for waste committed by a trespasser *Ibid.*

WATER COURSE.

See MILLS.

WAY.

1. Towns are liable to an individual, under *St.* 1786, *c.* 81, § 7, [see Revised Stat. *c.* 25, § 22,] for an injury occasioned by an incumbrance in the road, (as by large stones being left in it,) as well as for one occasioned by any defect in it. *Bigelow* v. *Weston.* 267

2. A turnpike road may be laid out over an old county or town road; and the turnpike corporation's receiving toll for the road so laid out, is conclusive evidence of

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their being bound to keep it in repair; so that they cannot object that it was never accepted as a turnpike road, or that it is not of the width required by law. *Commonwealth* v. *Worcester Turnpike Corporation.* 327

3 So far as it regards the public, an agreement by the town in which such road lies, to keep it in repair, will not release the turnpike corporation from their obligation in that respect. *Ibid.*

4. Passing in a vehicle swiftly by a turnpike gate and not stopping when called after to pay the toll, is a forcible passing within the meaning of the statutes respecting turnpike roads. *Nichols* v. *Bertram.* 342

5 Erecting a toll-board with the rates of toll in the small Roman character, but of a large size, was held to be a compliance with a statute requiring them to be in "large or capital letters." *Ibid.*

6 A town may acquire a right of way by grant, and exclusive uninterrupted user by the inhabitants for twenty years, unexplained, is evidence of a grant; but such way will be a private way, and a nuisance on it will not be indictable. *Commonwealth* v. *Low.* 408

7 A public town way can be established only in the mode prescribed by *St.* 1786, *c.* 67; and a record of the establishment of such a way cannot, it seems, be presumed from a user for any length of time. *Ibid*

WHALE FISHERY.

See SHIPS, &c., 1, 2, 3, 4, 5.

WILL.

1. A codicil fraudulently destroyed, was established upon parol proof of its contents. *Clark* v. *Wright.* 67

2. S makes a will, bequeathing legacies "to the two oldest children" of M. One of the two oldest at the date of the will dies. S afterwards by a codicil confirms the will, except in some particulars, saying nothing of these bequests. *Held*, that the two oldest children living at the testator's decease, were entitled to the legacies. *Miles* v. *Boyden.* 213

3. A mistake in the name or description of a devisee will not make void the devise where the intention of the testator is clear, as where the devisees were called by their popular name, *The South Parish in S*, their legal name being *The First Parish in S. First Parish in Sutton* v. *Cole.* 232

4. Devise of "the remainder of my property, of whatsoever name or nature," accompanied with a schedule of the testator's property, which was all personal. *Held*, that the will did not purport a disposition of both real and personal estate, and therefore did not require the attestation of three witnesses. *Very* v. *Very.* 374

WITNESS.

See BILLS OF EXCHANGE &c., 8, 9.
COSTS, 4.
EVIDENCE, 6, 16, 26, 27, 28, 38.

WRIT.

An original writ prosecuted by an individual was indorsed thus — "A. B. by C. D. his attorney." — *Held*, that the attorney had thereby made himself responsible for the costs which the defendant should recover, and consequently had disqualified himself to be a witness on the part of the plaintiff. *Chadwick* v. *Upton and Trustees.* 442

END OF THE THIRD VOLUME.

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